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# JUSTICE AND ADMINISTRATIVE LAW



*BY THE SAME AUTHOR*

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# JUSTICE AND ADMINISTRATIVE LAW

A STUDY OF  
THE BRITISH CONSTITUTION

BY

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TO  
LEONARD WOOLF

The period has been one of unprecedented intellectual progress. . . . We do not go about saying that there is another defeat for science, because its old ideas have been abandoned. We know that another step of scientific insight has been gained.

A. N. WHITEHEAD :

*Science and the Modern World.*

## P R E F A C E

THIS book has been out of print since the autumn of 1939. As I was fully occupied on work in Government Departments for almost the entire period of the war, it was impossible for me to find the time and energy required for the preparation of a new edition until 1946, when I had relinquished my official post.

The book has been thoroughly revised and brought up to date. Chapter 3 has been rewritten and is much longer than the original chapter. Chapters 6 and 7 are entirely new and there is much new material in Chapter 8 and other parts of the book. The volume is thus substantially enlarged. The increase in size is not due, however, to the author having become more long-winded, but to the extensive developments which have taken place since the book was first published. I have described a mass of new legislative provisions and many judicial decisions relating to Administrative Tribunals. I have dealt comprehensively with the reports of the Committee on Ministers' Powers and several other official Committees; and I have discussed in some detail the work of certain Administrative Tribunals. In dealing with the National Insurance Schemes and the National Health Service, I have included both the old law and the new, having regard to the fact that the former is at present still in operation, although it will shortly be superseded by the latter.

I have dealt in an Appendix with the provisions relating to administrative justice contained in three

of the writings of public lawyers and political scientists in the United States. I am particularly indebted to such books as *The Administrative Process* by J. M. Landis, late Dean of the Harvard Law School, and *Administrative Legislation and Adjudication* by Dr. F. F. Blachly and Dr. Miriam S. Oatman; to the important work on *The Independent Regulatory Commissions* by Professor Robert E. Cushman; to the writings of Professor Blythe Stason, Dean of the Law School of Michigan University; to the masterly Report of the *Attorney-General's Committee on Administrative Procedure*, and the Report of the *President's Committee on Administrative Management*. I have gained much through friendly discourse on both sides of the Atlantic with friends and colleagues working in the same field.

I am once again obliged to Mr. C. W. Ringrose, of Lincoln's Inn Library, for undertaking the preparation of the Index and the Tables.

W. A. R.

London School of Economics and  
Political Science.

June 1947.

# CONTENTS

<i>Preface</i> . . . . .	<i>page vii</i>
<i>Table of Cases</i> . . . . .	xv
<i>Table of Statutes</i> . . . . .	xxiii
<i>Introduction</i> . . . . .	xxviii
1. ADMINISTRATIVE AND JUDICIAL POWER . . . . . 1	
The Distribution of the Power to Decide . . . . .	1
The Functions of Government . . . . .	4
The Legendary Separation of Powers . . . . .	13
The Administrative Functions of Judges . . . . .	19
The Judicial Functions of Administrators . . . . .	23
Administrative Law in England . . . . .	25
The Hegemony of the Executive . . . . .	31
Conclusion . . . . .	33
2 JUSTICE IN THE COURTS . . . . . 38	
Popular Notions of the Judicial Process . . . . .	38
The Independence of the Judge . . . . .	40
The Immunity of the Judge . . . . .	46
The Responsibility of the Administrator . . . . .	51
The Integrity of the Judge . . . . .	54
The Integrity of Administrators . . . . .	59
The Judge must Act Personally . . . . .	65
The <i>Lis Inter Partes</i> . . . . .	66
The Right to be Heard . . . . .	71
According to the Evidence . . . . .	74
The Case in Hand . . . . .	78
A Final Decision . . . . .	79
Conclusion . . . . .	83
3. ADMINISTRATIVE TRIBUNALS . . . . . 86	
The Railway Courts . . . . .	87
The Traffic Commissioners . . . . .	96
The Judicial Functions of the Minister of Transport . . . . .	101



3. ADMINISTRATIVE TRIBUNALS—*continued*.

The Road and Rail Appeal Tribunal . . . . .	page 105
The Judicial Functions of the Minister of Health . . . . .	107
National Health Insurance Tribunals . . . . .	117
National Medical Service Tribunals . . . . .	130
The Judicial Powers of the District Auditor . . . . .	134
The Judicial Functions of the Board of Trade . . . . .	138
The Judicial Functions of the Home Secretary . . . . .	141
The Judicial Functions of the Minister of Fuel and Power . . . . .	144
The Judicial Functions of the Electricity Commissioners . . . . .	147
The Judicial Functions of the Minister for Town and Country Planning . . . . .	150
The Judicial Functions of the Minister of Education . . . . .	155
Independent School Tribunals . . . . .	162
Tribunals for Unemployment Insurance . . . . .	164
Tribunals for Unemployment Assistance . . . . .	172
Pensions Tribunals . . . . .	173
The New National Insurance Scheme . . . . .	176
National Service Tribunals . . . . .	180
Local Appeal Boards . . . . .	191
Reinstatement Tribunals . . . . .	193
Tribunals for Industrial Injuries . . . . .	194
Tribunals for Family Allowances . . . . .	201
The London Building Tribunal . . . . .	202
Furnished Rent Tribunals . . . . .	203
The Registrar of Friendly Societies and Industrial Assur- ance Commissioner . . . . .	205
War Compensation Tribunals . . . . .	211
The Commission on Awards to Inventors . . . . .	212
Conclusion . . . . .	215

4. DOMESTIC TRIBUNALS . . . . .	219
Voluntary Associations . . . . .	219
Their Judicial Functions . . . . .	222
Their Organs of Justice . . . . .	225
The Attitude of the Judicature . . . . .	226
Natural Justice . . . . .	227
Immunity from the Courts . . . . .	230
Vocational Organisations . . . . .	234
An Absence of Control . . . . .	238
The Marketing Board Movement . . . . .	242
The Falmouth Committee . . . . .	247
Conclusion . . . . .	254

5. THE JUDICIAL MIND . . . . .	page 255
The Psychological Background . . . . .	255
The Need for Consistency . . . . .	258
The Need for Equality . . . . .	263
The Need for Certainty . . . . .	268
The Rule of Reason . . . . .	273
The Technique of Impartial Thought . . . . .	278
The Artificial Reason of the Law . . . . .	282
The Exclusion of Imponderables . . . . .	286
Judicial Discretion . . . . .	294
The Good Judge . . . . .	303
Conclusion . . . . .	312
6. THE COMMITTEE ON MINISTERS' POWERS . . . . .	314
The Genesis of the Inquiry . . . . .	314
The Treasury Solicitor's Evidence . . . . .	318
The Ministry of Health's Evidence . . . . .	322
The Author's Evidence . . . . .	326
The Evidence of the National Federation of Property Owners . . . . .	336
Dicey and the Rule of Law . . . . .	342
Judicial and Quasi-Judicial Decisions . . . . .	349
The Safeguards of Justice . . . . .	355
Administrative Law Disallowed . . . . .	358
The Issues Defined . . . . .	361
Dr. Jennings' Views . . . . .	364
Dr. Allen's Views . . . . .	367
Conclusion . . . . .	373
7. THE ATTITUDE OF THE JUDICATURE . . . . .	377
Judicial Indulgence . . . . .	377
The <i>Arlidge Case</i> . . . . .	380
The Minister and his Jurisdiction . . . . .	388
The <i>Davis and Yaffe Cases</i> . . . . .	390
Clearance Orders in the Courts . . . . .	393
The Minister's Advisory Powers . . . . .	397
The Inspector's Report . . . . .	400
The Cult of the <i>Quasi</i> . . . . .	401
Procedure of Administrative Tribunals . . . . .	403
Judicial Review Considered . . . . .	409
The Law Officers and Patent Appeals . . . . .	410
The Sargant Committee . . . . .	413
The Business of the Courts Committee . . . . .	415
The Swan Committee . . . . .	417
'According to the Evidence' . . . . .	420
Conclusion . . . . .	425

8. TRIAL BY WHITEHALL: AN EVALUATION . . .	page 426
The Revival of Administrative Law . . . . .	426
The Causes of its Growth . . . . .	427
The Evolution of New Standards . . . . .	432
The Advantages of Administrative Tribunals . . . . .	439
The Disadvantages of Administrative Tribunals . . . . .	454
The Bogey of Political Interference . . . . .	461
The Structure of Administrative Tribunals . . . . .	467
The Personnel of Administrative Tribunals . . . . .	477
The Dangers of Administrative Law . . . . .	481
The Regulation of Administrative Tribunals . . . . .	486
The Control of Domestic Tribunals . . . . .	495
Some Constructive Proposals . . . . .	498
A Matter for Parliament . . . . .	507
Conclusion . . . . .	513

*Appendix*

The Transport Bill, Electricity Bill and Town and Country Planning Bill . . . . .	518
--	-----

<i>Index of Names</i> . . . . .	529
---------------------------------	-----

<i>General Index</i> . . . . .	532
--------------------------------	-----

## TABLE OF CASES

<i>Ackers v. Howard</i> (1886), 16 Q.B.D. 739; 55 L.J.Q.B. 233; 4 O'M. & H. 65	19
<i>Adams v. Tanner</i> (1916), 244 U.S. 590	445
<i>Allbutt v. General Council of Medical Education</i> (1889), 23 Q.B.D. 400; 61 L.T. 585; 37 W.R. 771	234
<i>Anderson v. Gorrie</i> , [1895] 1 Q.B. 668; 14 R. 79; 71 L.T. 382, C.A.	47
<i>Ashby v. White</i> (1703), 2 Ld.Raym. 938; 3 <i>Idem</i> 320; 1 Smith L.C. 18th ed. 253	53
<i>Atkinson v. Newcastle Waterworks Co.</i> (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 42 J.P. 183; 25 W.R. 794	53
<i>Att.-Gen. v. Edison Telephone Co.</i> (1880), 50 L.J.Q.B. 145; 6 Q.B.D. 244; 43 L.T. 607	283
<i>Attwood v. Lamont</i> , [1920] 3 K.B. 571; 65 S.J. 25; 36 T.L.R. 895	305
<i>Banshee, The</i> (1887), 56 L.T. 725; 6 Asp. M.C. 221	444
<i>Barratt v. Kearns</i> , [1905] 1 K.B. 504; 74 L.J.K.B. 518; 92 L.T. 255; 53 W.R. 356; 21 T.L.R. 212	505
<i>Beard, Re, Reversionary and Gen. Securities Co., Ltd. v. Hall</i> , [1908] 1 Ch. 383; 77 L.J.Ch. 265	305
<i>Beaumont v. Reeve</i> (1846), 8 Q.B. 483; 15 L.J.Q.B. 141; 10 Jur. 284	305
<i>Begbie v. Phosphate Sewage Co.</i> (1875), L.R. 10 Q.B. 491; 35 L.T. 350; 25 W.R. 85, C.A.	305
<i>Bile Bean Mfg. Co. v. Davidson</i> (1906), 8 F. 1181, Ct. of Sess.	305
<i>Board of Education v. Rice</i> , [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 9 L.G.R. 652	49, 378, 385, 394
<i>Bottomley v. Brougham</i> , [1908] 1 K.B. 584; 99 L.T. 111; 24 T.L.R. 262; 77 L.J.K.B. 311	48
<i>Boulter v. Kent Justices</i> , [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288	6, 68
<i>Bourne v. Keane</i> , [1919] A.C. 815; 89 L.J.Ch. 17; 121 L.T. 426; 35 T.L.R. 560	305
<i>Bowman, Re, South Shields (Thames St.) Clearance Order</i> , [1932] 2 K.B. 621; 101 L.J.K.B. 798; 147 L.T. 150; 96 J.P. 207; 48 T.L.R. 351; 76 S.J. 273; 30 L.G.R. 245	338
— <i>v. Secular Soc.</i> , [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 33 T.L.R. 376	306
<i>British Imperial Oil Co. v. Federal Commissioner of Taxation</i> (1925), 35 C.L.R. 422	8
<i>Brookes v. Earl of Rivers</i> (1668), <i>Hardres Rep. of Exchequer</i> 503	55
<i>Burr v. Smith</i> , [1909] 2 K.B. 306; 78 L.J.K.B. 889; 101 L.T. 196; 25 T.L.R. 542	48
<i>Byron (Lord) v. Dugdale</i> (1823), 25 R.R. 282	307
<i>Capel v. Child</i> (1832), 2 C. and J. 558; 2 Tyr. 689; 1 L.J.Ex. 205	228
<i>Cassel v. Inglis</i> , [1916] 2 Ch. 211; 85 L.J.Ch. 569; 114 L.T. 935; 32 T.L.R. 555	237, 295
<i>Cheyne v. Architects' Registration Council</i> , [1943] S.C. 468	236
<i>Chicago B. &amp; Q. Ry. v. Babcock</i> (1907), 204 U.S. 585	293
<i>Coalport China Co., Re</i> , [1895] 2 Ch. 404; 64 L.J.Ch. 710; 12 R. 462; 73 L.T. 46	234

<i>Collins v. Henry Whiteway &amp; Co.</i> , [1927] 2 K.B. 378; L.J.K.B. 790; 137 L.T. 297; 43 T.L.R. 532	506
<i>Consolidated Exploration Co. v. Musgrave</i> , [1900] 1 Ch. 37; 69 L.J. Ch. 11; 81 L.T. 747	305
<i>Cooper v. Wilson</i> , [1937] 2 K.B. 309; 106 L.J.K.B. 728; 157 L.T. 290; 161 J.P. 349; 35 L.G.R. 436; 81 S.J. 357; 53 T.L.R. 623; [1937] 2 All E.R. 726	58, 61, 401, 402
<i>Crocker v. Plymouth Corp.</i> , [1906] 1 K.B. 494; 75 L.J.K.B. 375; 94 L.T. 734; 22 T.L.R. 336	155, 288, 436
<i>Cullen v. Morris</i> (1819), 2 Stark 577; 20 R.R. 742	19
<i>Curle's (Auditor) Case</i> (1609), Cok. Rep. xi. 3	78
<i>Dann v. Curzon</i> (1910), 104 L.T. 66; 55 S.J. 189; 27 T.L.R. 163	305
<i>Dawkins v. Lord Rokeby</i> (1873), L.R. 8 Q.B. 255; 42 L.J.Q.B. 63; 28 L.T. 134; 21 W.R. 541	505
<i>Day v. Savage</i> (1614), Hob. 87	56
<i>Denby (Wm.) &amp; Son v. Minister of Health</i> , [1936] 1 K. B. 337; 105 L.J.K.B. 134; 154 L.T. 180; 100 J.P. 107; 80 S.J. 33; 84 L.G.R. 81; 52 T.L.R. 173	400
<i>De Verteuil v. Knaggs</i> , [1918] A.C. 557; 87 L.J.P.C. 128; 118 L.T. 738; 34 T.L.R. 325	386
<i>De Windt v. De Windt</i> (1854), 23 L.J.Ch. 776; 2 Eq.R. 1107; 2 W.R. 648	305
<i>Dodd v. Francisco</i> , 38 N.J. Law 490; 53 Atl. 219	68
<i>Donoghue v. Stevenson</i> , [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; 48 T.L.R. 494; 76 S.J. 396	351
<i>Eccles v. Wirral Rural Sanitary Authority</i> (1886), 17 Q.B.D. 107; 55 L.J.M.C. 106; 34 W.R. 412	378
<i>Errington v. Minister of Health</i> , [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; 51 T.L.R. 44; 78 S.J. 754; 82 L.G.R. 481	75, 393, 394, 397, 398
<i>Everett v. Griffiths</i> , [1921] 1 A.C. 631; 90 L.J.K.B. 737; 125 L.T. 230; 37 T.L.R. 481	49, 384
<i>F. v. F.</i> , [1902] 1 Ch. 688; 71 L.J.Ch. 415	21
<i>Fisher v. Jackson</i> , [1891] 2 Ch. 84; 60 L.J.Ch. 482	229
<i>— v. Keane</i> (1878), 11 Ch.D. 353; 49 L.J.Ch. 11; 41 L.T. 335	227
<i>Floyd v. Barker</i> (1608), 12 Co.Rep. 24	48
<i>Forster v. National Amal. Union of Shop Assistants, etc.</i> , [1927] 1 Ch. 539; 96 L.J.Ch. 141; 137 L.T. 86; 43 T.L.R. 199; 71 S.J. 165	208
<i>Fray v. Blackburn</i> (1863), 3 B. & S. 576	47
<i>Fredman v. Minister of Health</i> (1936), 154 L.T. 240; 80 J.P. 104; 100 S.J. 56; 34 L.G.R. 153	399
<i>Frome United Breweries v. Bath Justices</i> , [1926] A.C. 586; 95 L.J. K.B. 730; 135 L.T. 482	57
<i>Frost v. Minister of Health</i> , [1935] 1 K.B. 286; 104 L.J.K.B. 218; 51 T.L.R. 171; 152 L.T. 330; 99 J.P. 87; 33 L.G.R. 20	395
<i>Fuller v. County of Colfax</i> (1882), 14 Fed. 177	255
<i>General Medical Council v. Spackman</i> , [1943] A.C. 627; 112 L.J.K.B. 529; 169 L.T. 226; 59 T.L.R. 412; 87 S.J. 293	230, 234, 242
<i>Gibson v. Reach</i> , [1924] 1 K.B. 294; 93 L.J.K.B. 194; 130 L.T. 411; 40 T.L.R. 73	60

<i>Glyn v. Weston Feature Film Co.</i> , [1916] 1 Ch. 261; 85 L.J.Ch. 261; 114 L.T. 354; 32 T.L.R. 235	307
<i>Gray v. Matthias</i> (1800), 5 Ves. 285 (a); 5 R.R. 48	305
<i>Gresham Life Ass. Soc., Re</i> (1872), L.R. 8 Ch. 446; 42 L.J.Ch. 183; 28 L.T. 150; 21 W.R. 186	238
<i>H. v. H.</i> , <i>Re</i> , [1909] 2 Ch. 260; 78 L.J.Ch. 745	21
<i>Haigh v. Haigh</i> (1861), 31 L.J.Ch. 420; 8 Jur. (N.S.) 983; 5 L.T. 507	65
<i>Hall v. Manchester Corp.</i> (1915), 84 L.J.Ch. 732; 113 L.T. 465; 13 L.G.R. 1105; 31 T.L.R. 416	83
<i>Hammond v. Howell</i> (1678), 2 Mod. 218	47
<i>Hancock v. Somes</i> (1859), 1 Bl. & E. 795; 28 L.J.M.C. 196; 7 W.R. 422; 8 Cox C.C. 172	10
<i>Hardie &amp; Lane v. Chilton</i> , [1928] 2 K.B. 306; 97 L.J.K.B. 530; 130 L.T. 275; 44 T.L.R. 470	225
<i>Harman v. Butt</i> , [1944] 1 K.B. 491; 170 L.T. 355; 60 T.L.R. 341; [1944] 1 All E.R. 558; 42 L.G.R. 158	237
<i>Hartley v. Rice</i> (1808), 10 East 22; 10 R.R. 228	305
<i>Hearts of Oak Assurance Co., Ltd. v. Att.-Gen.</i> , [1932] A.C. 392; 101 L.J.Ch. 177; 147 L.T. 41; 48 T.L.R. 296; 76 S.J. 217	7, 74
<i>Hepworth v. Ryott</i> , [1920] 1 Ch. 1; 89 L.J.Ch. 69; 122 L.T. 135; 36 T.L.R. 10	305
<i>Hermann v. Charlesworth</i> , [1905] 2 K. B. 123; 74 L.J.K.B. 620; 93 L.T. 284; 21 T.L.R. 368	305
<i>Horn v. Minister of Health</i> , [1937] 1 K.B. 164; 105 L.J.K.B. 649; 155 L.T. 335; 100 J.P. 463; 80 S.J. 688; 34 L.G.R. 495; [1936] 2 All E.R. 1299	397, 398
<i>Houlder Bros. v. Gibbs</i> , [1925] Ch. 575; 94 L.J.Ch. 312; 133 L.T. 322; 41 T.L.R. 487	302
<i>Huddart Parker &amp; Co. v. Moorehead</i> (1908), 8 C.L.R. 330, 357	7
<i>Hutton v. Att.-Gen.</i> , [1927] 1 Ch. 427; 96 L.J.Ch. 285; 43 T.L.R. 166	74
<i>Institute of Patents Agents v. Lockwood</i> , [1894] A.C. 347; 63 L.J.P.C. 74; 6 R. 219; 71 L.T. 205	235
<i>Jager v. Tolme</i> , [1916] 1 K.B. 939; 85 L.J.K.B. 1116; 114 L.T. 647; 32 T.L.R. 291	258
<i>Jeffrey v. Bamford</i> , [1921] 2 K.B. 351; 90 L.J.K.B. 664; 125 L.T. 348; 37 T.L.R. 601	305
<i>Keighley's Case</i> (1609), 10 Co. Rep. 139 (a)	294
<i>Labouchere v. Earl of Wharnccliffe</i> (1879), 13 Ch.D. 346; 41 L.T. 638; 28 W.R. 367	228
<i>La Mert, ex p.</i> (1863), 4 B. & S. 582; 33 L.J.Q.B. 69; 12 W.R. 201	234
<i>Lapointe v. L'Association de Bienfaisance</i> , [1906] A.C. 535; 75 L.J. P.C. 73; 95 L.T. 479	220
<i>Law v. Chartered Institute of Patent Agents</i> , [1919] 2 Ch. 276; 88 L.J.Ch. 319; 121 L.T. 50; 36 R.P.C. 163; 35 T.L.R. 385	232
<i>Leavett v. Clark</i> , [1915] 3 K.B. 9; 84 L.J.K.B. 2157; 113 L.T. 124; 13 L.G.R. 891; 31 T.L.R. 424	283
<i>Leconfield v. Thornely</i> , [1926] A.C. 10; 95 L.J.K.B. 137; 134 L.T. 1; 42 T.L.R. 15; 23 L.G.R. 655; 89 J.P. 199	43

<i>Lee v. Bude and Torrington Junction Rly. Co.</i> (1871), L.R. 6 C.P. 576; 40 L.J.C.P. 285; 24 L.T. 827; 19 W.R. 954	50
<i>Leeds Corporation v. Ryder</i> , [1907] A.C. 430; 76 L.J.K.B. 1032; 97 L.T. 261; 23 T.L.R. 721	60
<i>Leeson v. Gen. Council of Medical Education</i> (1889), 13 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849	227, 231, 237, 238, 242
<i>Lloyd's (Dr.) Case</i> (1925), <i>The Times</i> , Nov. 30, 1925	496
<i>Local Government Board, Re</i> (1885), 16 L.R.Tr. 150	10, 39
<i>— v. Arlidge</i> , [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 12 L.G.R. 1109; 30 T.L.R. 672	49, 300, 380, 382, 469
<i>London C. C. (Riley St., Chelsea, No. 1) Order</i> , 1938, [1915] 2 All E.R. 484; 173 L.T. 253; 43 L.G.R. 292	400
<i>London, City of v. Wood</i> (1701), 12 Mod., at p. 687	56
<i>Lowe v. Peers</i> (1768), 4 Burr. 2225	305
<i>MacAlister v. Stevenson</i> : see <i>Donoghue v. Stevenson</i> .	
<i>Macduff, Re</i> , [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154	308
<i>Manchester (Ringway Airport) Compulsory Purchase Order, Re</i> , 153 L.T. 219; 99 J.P. 319; 33 L.G.R. 314; 79 S.J. 503	306
<i>Miller v. Minister of Health</i> , [1946] 1 K.B. 626; [1947] L.J. 148; 62 T.L.R. 611; 90 S.J. 503; 44 L.G.R. 370; 110 J.P. 353	399
<i>Minister of Health v. R. (on the prosecution of Yaffe)</i> , [1931] A.C. 494; 100 L.J.K.B. 306; 145 L.T. 98; 95 J.P. 125; 29 L.G.L. 305; 75 S.J. 232; 47 T.L.R. 337	391
<i>Morgan, Re</i> (1910), 26 T.L.R. 398	305
<i>Morris v. Saxelby</i> , [1916] 1 A.C. 683; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297	305
<i>Morley v. Rennoldson</i> , [1895] 1 Ch. 449; 64 L.J.Ch. 485; 12 R. 158; 72 L.T. 308; 43 W.R. 518	305
<i>Moxon v. Minister of Pensions</i> , [1945] 1 K.B. 490; 173 L.T. 56; 61 T.L.R. 458; [1945] 2 All E.R. 124	403
<i>Newry and Enniskillen Ry. v. Ulster Ry.</i> (1856), 8 De G.M. & G. 487; 2 Jur. (n.s.) 936; 4 W.R. 761	65
<i>Nordenfeldt v. Maxim-Nordenfeldt Gun Co.</i> , [1894] A.C. 535; 63 L.J.Ch. 908; 11 R. 1; 71 L.T. 489	305, 306
<i>North-Western Salt Co. v. Electrolytic Alkali Co.</i> , [1914] A.C. 461; 83 L.J.K.B. 530; 110 L.T. 852; 30 T.L.R. 313	305
<i>O'Connor v. Waldron</i> , [1935] A.C. 76; 104 L.J.P.C. 21; 152 L.T. 289; 51 T.L.R. 125; 78 S.J. 859	506
<i>O'Connor &amp; Ould v. Ralston</i> , [1920] 3 K.B. 451; 36 T.L.R. 768	305
<i>Offer v. Minister of Health</i> , [1936] 1 K.B. 40; 105 L.J.K.B. 6; 163 L.T. 270; 51 T.L.R. 546; 79 S.J. 609; 33 L.G.R. 369	396, 398
<i>Onions v. Nash</i> (1819), 7 Price 203	55
<i>Parsons v. Lakenheath School Board</i> (1889), 58 L.J.Q.B. 371	384
<i>People v. Mayor</i> , 5 Barb. 43	12
<i>Philips v. Buyl</i> (1788), 2 Term.Rep. 346	67
<i>Phillips v. Probyn</i> , [1899] 1 Ch. 811; 68 L.J.Ch. 401; 80 L.T. 613	305
<i>Pickering v. James</i> (1873), L.R. 8 C.P. 489; 42 L.J.C.P. 217; 29 L.T. 210; 21 W.R. 786	53

# TABLE OF CASES

ALB

Post v. Marsh (1880), 16 Ch.D. 395; 50 L.J.Ch. 287; 43 L.T. 628; 29 W.R. 198	305
Price v. Minister of Health, [1947] L.J. 29; 176 L.T. 305; 111 J.P. 56; 63 T.L.R. 9; 45 L.G.R. 13	399
Pritchard v. Mayor of Bangor (1888), 13 App. Cas. 241; 57 L.J.Q.B. 313; 58 L.T. 502; 37 W.R. 103	68
Ramadge v. Ryan (1832), 9 Bing. 333; 2 L.J.C.P. 7; 2 M. & Scott 421	55
Randenbusch's Appeal, 120 Pa. 342; 14 Atl. 150	68
Rex v. Bath Compensation Authority, [1925] 1 K.B. 685; 94 L.J.K.B. 613; 23 L.G.R. 405; 133 L.T. 116; 41 T.L.R. 346	56, 59
R. v. Architects' Registration Tribunal, <i>Ex p. Jagger</i> (1945), 61 T.L.R. 445; 89 S.J. 438; [1945] 2 All E.R. 431	236, 407
— v. Bishop of London (1812), 15 East 117; 13 R.R. 409	233
— v. Boteler (1864), 33 L.J.M.C. 101; 4 B. & S. 959; 28 J.P. 453	290
— v. Bowman, [1898] 1 Q.B. 663; 67 L.J.Q.B. 463; 78 L.T. 230; 62 J.P. 374	301
— v. Brakenridge (1884), 48 J.P. 293	58
— v. Brighton Corporation (1916), 85 L.J.K.B. 1552; 114 L.T. 800; 14 L.G.R. 776; 92 T.L.R. 239	267, 301
— v. Brixton Income Tax Commissioners (1913), 29 T.L.R. 712; 6 T.C. 195	61
— v. Chancellor of Cambridge (1722), 1 Str. 566	227
— v. Collins (1876), 2 Q.B.D. 30; 46 L.J.Q.B. 257; 36 L.T. 192; 24 W.R. 732	19
— v. Denbighshire Justices (1880), 1 B. & Ad. 616; 9 L.J.(o.s.)M.C. 109	84
— v. Denyer, [1926] 2 K.B. 258; 95 L.J.K.B. 699; 134 L.T. 137; 42 T.L.R. 453	225
— v. Drummond (1903), 88 L.T. 833	10
— v. Essex Justices, <i>Ex p. Perkins</i> , [1927] 2 K.B. 475; 96 L.J.K.B. 530; 137 L.T. 455; 91 J.P. 94; 43 T.L.R. 415	58
— v. Farnborough Urban District Council, [1920] 1 K.B. 234; 89 L.J.K.B. 284; 122 L.T. 283; 83 J.P. 290; 36 T.L.R. 92	301
— v. Hain (1896), 12 T.L.R. 323	54
— v. Hendon R. D. C., <i>Ex p. Chorley</i> , [1933] 2 K.B. 696; 102 L.J.K.B. 658; 149 L.T. 535; 97 J.P. 210; 49 T.L.R. 482; 31 L.G.R. 332	61
— v. Housing Appeal Tribunal, [1920] 3 K.B. 334; 89 L.J.K.B. 1133; 123 L.T. 673; 18 L.G.R. 571; 36 T.L.R. 713	385
— v. Howard, [1902] 2 K.B. 363; 71 L.J.K.B. 751; 86 L.T. 839; 51 W.R. 21; 60 J.P. 579	60
— v. Huntingdon Confirmation Authority, <i>Ex p. George &amp; Stamford Hotels, Ltd.</i> , [1929] 1 K.B. 698; 98 L.J.K.B. 331; 141 L.T. 75; 45 T.L.R. 250; 93 J.P. 81; 73 S.J. 173; 27 L.G.R. 319	72
— v. Lancashire Justices (1906), 75 L.J.K.B. 198; 94 L.T. 481; 70 J.P. 337	57
— v. Lediard (1751), Sayer's Rep. 6	9
— v. Lisnaskea Poor Law Guardians, [1918] 2 Ir. R. 258—K.B.D.	5 136
— (Dixon) v. Local Government Board (1878), 2 L.R.Ir. 316	6
— v. — (1882), 10 Q.B.D. 309; 52 L.J.M.C. 4; 48 L.T. 181	378
— v. —, [1911] 2 Ir. 331—K.B.D.	107, 385
— <i>Ex p. Arlidge</i> , [1911] 1 K.B. 160; 83 L.J.K.B. 86 337, 409, 169	391,
v. —, [1918] 2 Ir. R. 131 K.B.D.	302



R.-(Wexford C. C.) v. Local Government Board, [1902] 2 Ir. R.	349	83
— v. London County Council, [1918] 1 K.B. 68; 87 L.J.K.B. 303; 118 L.T. 107; 82 J.P. 20; 34 T.L.R. 21		297
— v. —, <i>Ex p.</i> Akkersdyk, [1892] 1 Q.B. 190; 61 L.J.M.C. 76; 36 L.T. 168; 40 W.R. 285; 56 J.P. 8		57
— v. —, <i>Ex p.</i> Commercial Gas Comp. (1895), 11 T.L.R. 337	6, 75	
<i>Re</i> The Empire Theatre (1894), 71 L.T. 638		56
— v. Manchester Justices, [1899] 1 Q.B. 571; 68 L.J.Q.B. 358; 80 L.T. 531; 47 W.R. 410		6
— v. Marshall (1925), 18 Cr.App.R. 164		265
— v. Marsham (1883), 50 L.T. 142; 32 W.R. 157; 48 J.P. 308		10
— v. Minister of Health, <i>Ex p.</i> Davis, [1929] 1 K.B. 619; 98 L.J.K.B. 636; 141 L.T. 6; 93 J.P. 49; 45 T.L.R. 345; 27 L.G.R. 677		338, 390
— v. Minister of Transport, <i>Ex p.</i> Grey Coaches, Ltd. (1933), 77 S.J. 301; <i>The Times</i> , Feb. 23 & March 29, 1933		299, 489
— v. —, <i>Ex p.</i> Upminster Services, Ltd., [1934] 1 K.B. 277; 103 L.J.K.B. 257; 150 L.T. 152; 98 J.P. 81; 50 T.L.R. 60; 32 L.G.R. 61		388
— v. Newcastle-on-Tyne Corporation (1889), 60 L.T.(N.S.) 963; 53 J.P. 788		301
— v. Newmarket Assessment Committee, <i>Ex p.</i> Allen Newport, Ltd., [1945] 2 All E.R. 371; 173 L.T. 179; 109 J.P. 234; 89 S.J. 447; 43 L.G.R. 175		406
— v. Omagh Union Guardians (1890), 26 L.R.Ir. 619		11
— v. Porter, [1910] 1 K.B. 369; 79 L.J.K.B. 241; 102 L.T. 255; 74 J.P. 159; 26 T.L.R. 200		305
— v. Port of London Authority, <i>Ex p.</i> Kynoch, Ltd., [1919] 1 K.B. 176; 88 L.J.K.B. 553; 120 L.T. 177; 83 J.P. 41; 35 T.L.R. 103; 16 L.G.R. 937		297, 298, 387
— v. Prestwich Corp, <i>Ex p.</i> Gandz (1945), 109 J.P. 157; 43 L.G.R. 97		297
— v. Rand (1866), L.R. 1 Q.B. 230; 35 L.J.M.C. 157		54, 56
— v. Roberts, <i>Ex p.</i> Scurr, [1924] 2 K.B. 695; 94 L.J.K.B. 1; 88 J.P. 174; 40 T.L.R. 769		465
— v. Rosser (1836), 7 Car. & P. 648		77
— v. Salford Assessment Committee, [1937] 2 K.B. 1; 106 L.J.K.B. 344; 156 L.T. 474; 101 J.P. 225; 54 T.L.R. 474; 81 S.J. 198; 35 L.G.R. 219		61
— v. Sharman, [1898] 1 Q.B. 578; 67 L.J.Q.B. 460; 78 L.T. 320; 46 W.R. 367; 62 J.P. 296		6
— v. Sheffield Confirming Authority, [1937] 4 All E.R. 114; 36 L.G.R. 38		57
— v. Skinner (1772), Lofft's Rep. 55		47
— v. Smith (1915), 11 Cr.App.R. 229		265
— v. Sunderland Justices, [1901] 2 K.B. 357; 70 L.J.K.B. 946; 85 L.T. 183; 65 J.P. 599		55, 60
— v. Surrey North East Assessment Committee, <i>ex p.</i> F. W. Wool- worth & Co., [1933] 1 K.B. 776; 102 L.J.K.B. 763; 148 L.T. 428; 97 J.P. 46; 31 L.G.R. 119		61
— v. Sussex J.J., <i>Ex p.</i> McCarthy, [1924] 1 K.B. 256; 93 L.J.K.B. 129; 130 L.T. 510; 88 J.P. 3; 68 S.J. 253; 40 T.L.R. 80; 22 L.G.R. 46		58
— v. Sylvester (1862), 31 L.J.M.C. 93; 8 Jur.(N.S.) 484; 5 L.T. 794		296, 298
— v. Waterman's Comp., [1897] 1 Q.B. 659; <i>sub nom.</i> R. v. Lucy, 66 L.J.Q.B. 308		11

## TABLE OF CASES

xvi

<i>R. v. Whitaker</i> , [1914] 3 K.B. 1283; 84 L.J.K.B. 225; 112 L.T. 41; 30 T.L.R. 627; 58 S.J. 717	59
— <i>v. Woodhouse</i> , [1906] 2 K.B. 501; 75 L.J.K.B. 745; 95 L.T. 367; 70 J.P. 485; 22 T.L.R. 603	6
<i>Rigby v. Connol</i> (1880), 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 28 W.R. 650	226
<i>Roberts v. Hopwood</i> , [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 41 T.L.R. 436	136, 465
<i>Ronne v. Ronne</i> , <i>The Times</i> , April 25, 1927	292
<i>Rooke's Case</i> (1598), 5 Co.Rep. 99 (b)	294
<i>Royal Aquarium v. Parkinson</i> , [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 40 W.R. 450	47, 53, 505
<i>Sandbrook, Re</i> , [1912] 2 Ch. 471; 81 L.J.Ch. 800; 107 L.T. 148; 56 S.J. 721	305
<i>Scott v. Scott</i> , [1913] A.C. 417; 82 L.J.P. 74; 109 L.T. 1; 57 S.J. 498; 29 T.L.R. 520	20, 73
— <i>v. Stansfield</i> (1868), L.R. 3 Ex. 220; 37 L.J.Ex. 155; 18 L.T. 572; 16 W.R. 911	47
<i>Sharp v. Wakefield</i> , [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 39 W.R. 551; 55 J.P. 197	275, 295, 299
<i>Shell Co. of Australia v. Federal Commissioner of Taxation</i> , [1931] A.C. 275; 100 L.J.P.C. 55; 144 L.T. 421; 47 T.L.R. 115	7, 8, 68
<i>Simms Motor Units v. Minister of Labour and National Service</i> , [1946] W.N. 115; [1946] 2 All E.R. 201; 110 J.P. 310	192, 470
<i>Slingsby v. Bradford</i> , [1906] W.N. 51	305
<i>Society of Accountants in Edinburgh v. Lord Advocate</i> (1924), W.C. & Ins.Rep. 285	6, 84
<i>Solicitor (No. 2), Re</i> (1924), 93 L.J.K.B. 761; 131 L.T. 155; 68 S.J. 756; 40 T.L.R. 420	240
<i>Sorrell v. Smith</i> , [1925] A.C. 700; 94 L.J.Ch. 347; 133 L.T. 370; 41 T.L.R. 529; 69 S.J. 641	351
<i>Stafford v. Minister of Health</i> , [1946] K.B. 621; 115 L.J.K.B. 476; 110 J.P. 210; 90 S.J. 260; 62 T.L.R. 451; 44 L.G.R. 231	399
<i>Sterry v. Chifton</i> (1850), 9 C.B. 110; 19 L.J.C.P. 237; 14 Jur. 312	305
<i>Summers v. Salford Corporation</i> , [1943] A.C. 283; 112 L.J.K.B. 65; 168 L.T. 97; 107 J.P. 35; 59 T.L.R. 78; 86 S.J. 391; 41 L.G.R. 1	400
<i>Sutton v. Sutton</i> (1927), <i>The Times</i> , March 8, 1927	445
<i>Sydney, Municipal Council of v. Campbell</i> , [1925] A.C. 338; 94 L.J.P.C. 65; 133 L.T. 63	300
<i>Taff Vale Ry. v. Amalgamated Society of Railway Servants</i> , [1901] A.C. 426; 70 L.J.K.B. 905; 83 L.T. 474; 50 W.R. 44; 44 S.J. 714	351
<i>Taunton, Ex p.</i> (1833), 1 D.P.C. 55	10
<i>Thompson v. Thomas</i> (1891), 27 L.R.Ir. 457	305
<i>Thorne v. Motor Trade Association</i> , [1937] A.C. 797; 106 L.J.K.B. 495; 167 L.T. 399; 53 T.L.R. 810; 81 S.J. 476; [1937] 3 All E.R. 157	225
<i>Tozer v. Child</i> (1857), 7 El. & Bl. 377; 26 L.J.Q.B. 151; 3 Jur. (N.S.) 774; 5 W.R. 287	58
<i>Truax v. Corrigan</i> (1921), 257 U.S. 312	445
<i>Vacher &amp; Sons, Ltd. v. London Society of Compositors</i> , [1913] A.C. 107; 82 L.J.K.B. 232; 107 L.T. 722; 29 T.L.R. 73; 57 S.J. 75	224

Walsh v. Gladstone (1842), 13 Sim. 261; 13 L.J.Ch. 52; 7 Jur. 1143	305
— v. Walsh (1869), I.R. 4 Eq. 396	306
Ware & de Freville v. Motor Trade Assn., [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 37 T.L.R. 213; 65 S.J. 239	225
Weinberger v. Inglis, [1919] A.C. 606; 88 L.J.Ch. 287; 121 L.T. 65; 35 T.L.R. 399; 63 S.J. 461	237
Wells v. Foster (1841), 8 M. & W., at p. 151; 10 L.J.Ex. 218; 5 Jur. 466	305
West Virginia Case	80
White v. St. Marylebone Borough Council, [1915] 3 K.B. 249; 84 L.J.K.B. 2142; 119 L.T. 447	283
Wilson v. Esquimalt Nanaimo Railway Comp., [1922] 1 A.C. 202; 91 L.J.P.C. 21; 126 L.T. 451	386
Wood v. Wood (1874), L.R. 9 Ex. 190; 30 L.T. 815; 22 W.R. 709	228
Young v. Ladies' Imperial Club, [1920] 2 K.B. 523; 89 L.J.K.B. 563; 123 L.T. 191; 36 T.L.R. 392	228, 497

## TABLE OF STATUTES

Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 19 . . . . .	102
Justices Protection Act, 1848 (11 & 12 Vict. c. 44) . . . . .	49
Railway and Canal Traffic Reg. Act, 1854 (17 & 18 Vict. c. 31) . . . . .	88, 90, 449, 451
Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120) . . . . .	137
Medical Practitioners Act, 1858 (21 & 22 Vict. c. 90), s. 29 . . . . .	234
Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72) . . . . .	64
Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4 . . . . .	241
Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 10 . . . . .	102
Ballot Act, 1872 (35 & 36 Vict. c. 33) . . . . .	53
Public Health Act, 1872 (35 & 36 Vict. c. 79) . . . . .	106
Railway and Canal Traffic Act, 1873 (36 & 37 Vict. c. 48) . . . . .	92
Regulation of Railways Act, 1873 (36 & 37 Vict. c. 76) . . . . .	451
Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 6-8 . . . . .	142
Public Health Act, 1875 (38 & 39 Vict. c. 55) . . . . .	107, 108, 336, 377, 499
ss. 23, 36, 41, 46, 47, 62, 70, 120, 150 . . . . .	108
s. 268 . . . . .	109, 324, 378, 380
Rivers Pollution Act, 1876 (39 & 40 Vict. c. 75), s. 12 . . . . .	117
Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57) . . . . .	410
Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25) . . . . .	91, 92, 451
Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 . . . . .	269
Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57) . . . . .	92
Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 117 . . . . .	20
Public Health Act, 1890 (53 & 54 Vict. c. 59) . . . . .	23, 109
Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70) . . . . .	112
London C. C. (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii) . . . . .	202
Railway and Canal Traffic (Prov. Orders) Amendt. Act, 1891 (54 & 55 Vict. c. 12) . . . . .	92
Railway and Canal Traffic Act, 1892 (55 & 56 Vict. c. 44) . . . . .	92
Private Street Works Act, 1892 (55 & 56 Vict. c. 57) . . . . .	499
London C. C. (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi) . . . . .	202
Railways Regulation Act, 1894 (56 & 57 Vict. c. 29) . . . . .	92
Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 179 . . . . .	105
s. 470 . . . . .	104
ss. 474, 567 . . . . .	105
Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 1 . . . . .	205
ss. 2, 12, 68 . . . . .	206
Poor Law Officers Superannuation Act, 1896 (59 & 60 Vict. c. 60), s. 18 . . . . .	116
Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44), s. 9 . . . . .	115
Midwives Act, 1902 (2 Edw. 7, c. 17) . . . . .	240
Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 7 . . . . .	188
Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 29 . . . . .	212
ss. 49, 58, 75 . . . . .	141
Public Health Acts Amendt. Act, 1907 (7 Edw. 7, c. 53), s. 7 . . . . .	110
Old Age Pensions Act, 1908 (8 Edw. 7, c. 40) . . . . .	174
Children Act, 1908 (8 Edw. 7, c. 67), s. 74 . . . . .	144
Port of London Act, 1908 (8 Edw. 7, c. 68) . . . . .	386
Housing, Town Planning, etc., Act, 1909 (9 Edw. 7, c. 41), s. 11 . . . . .	112
s. 15 . . . . .	111, 112
s. 17 . . . . .	113
s. 39 . . . . .	112, 113
Sch. I . . . . .	57, 77

Asylum Officers' Superannuation Act, 1909 (9 Edw. 7, c. 48), s. 15 . . .	116
National Health Insurance Act, 1911 (1 & 2 Geo. 5, c. 55) . . .	464
s. 66 . . . . .	118
Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), ss. 1-2 . . .	207
s. 3 . . . . .	208
Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), s. 27 . . .	105
National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 27 (2) . . .	118
Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 70 . . .	25
s. 73 . . . . .	25
ss. 82, 87 . . . . .	138
ss. 154-7, 161 . . . . .	25
Registration of Business Names Act, 1916 (6 & 7 Geo. 5, c. 58), s. 14 . . .	139
Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 74 . . .	54
Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21), s. 3 (1) . . .	123
Housing, etc., Act, 1919 (9 & 10 Geo. 5, c. 35), s. 28 . . .	112
Ministry of Transport Act, 1919 (9 & 10 Geo. 5, c. 50), s. 2 (3) . . .	91
s. 11 . . . . .	436
War Pensions Act, 1919 (9 & 10 Geo. 5, c. 53), s. 8 . . .	175
Ferries (Acquisition by Local Authorities) Act, 1919 (9 & 10 Geo. 5, c. 75), s. 1 (3) . . .	103
Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80), s. 17 . . .	141
Nurses Registration Act, 1919 (9 & 10 Geo. 5, c. 94) . . .	324
Electricity Supply Act, 1919 (9 & 10 Geo. 5, c. 100), s. 16 . . .	148
National Health Insurance Act, 1920 (10 & 11 Geo. 5, c. 10) . . .	120
Gas Regulation Act, 1920 (10 & 11 Geo. 5, c. 28) . . .	145
War Pensions Act, 1921 (11 & 12 Geo. 5, c. 29), s. 2 . . .	174
Education Act, 1921 (11 & 12 Geo. 5, c. 51) . . .	156
s. 29 . . . . .	157
Railways Act, 1921 (11 & 12 Geo. 5, c. 55), Pt. III . . .	93
Electricity Supply Act, 1922 (12 & 13 Geo. 5, c. 46) . . .	147
s. 21 . . . . .	148
Local Government and other Officers' Superannuation Act, 1922 (12 & 13 Geo. 5, c. 59) . . .	115
Industrial Assurance Act, 1923 (13 & 14 Geo. 5, c. 8), s. 32 (1) . . .	209
Housing Act, 1925 (15 & 16 Geo. 5, c. 14) . . .	324
s. 3 . . . . .	112
ss. 11, 14 . . . . .	113
Pt. II . . . . .	390
s. 40 (v) . . . . .	391
Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), s. 7 (2) . . .	74
Teachers' Superannuation Act, 1925 (15 & 16 Geo. 5, c. 59) . . .	161
ss. 10, 16, Sch. 1 . . . . .	161
Widows', Orphans' and Old Age Contributory Pensions Act, 1925 (15 & 16 Geo. 5, c. 70), s. 29 . . .	175
Public Health Act, 1925 (15 & 16 Geo. 5, c. 71), s. 7 . . .	110
Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 1 . . .	144
Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), s. 49, Sch. VI . . .	116
Adoption of Children Act, 1926 (16 & 17 Geo. 5, c. 29), s. 8 (2) . . .	74
Electricity Supply Act, 1926 (16 & 17 Geo. 5, c. 51) . . .	147
ss. 7 (6), 9 . . . . .	148
ss. 10 (2), 12, 13 . . . . .	149
s. 14 . . . . .	150
s. 50, Sch. VI . . . . .	148
Coroners (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 59), s. 5 . . .	144
Police (Appeals) Act, 1927 (17 & 18 Geo. 5, c. 19), s. 2 . . .	143
Trade Disputes and Trade Unions Act, 1927 (17 & 18 Geo. 5, c. 22), s. 2 . . .	241
Audit (Local Authorities) Act, 1927 (17 & 18 Geo. 5, c. 31) . . .	137, 305

## TABLE OF STATUTES

xv

Nursing Homes Registration Act, 1927 (17 & 18 Geo. 5, c. 38) . . .	324
Petroleum (Consolidation) Act, 1928 (18 & 19 Geo. 5, c. 32), ss. 1-3 . .	143
Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 196 . . . . .	139
Gas Undertakings Act, 1929 (19 & 20 Geo. 5, c. 24) . . . . .	145
Local Government Act, 1929 (19 & 20 Geo. 5, c. 25), ss. 32, 35 . . .	103
Bridges Act, 1929 (19 & 20 Geo. 5, c. 33), s. 3 (2) . . . . .	103
Housing Act, 1930 (20 & 21 Geo. 5, c. 39) . . . . .	326, 392, 393, 397, 400
Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43) . . . . .	96, 101, 267n, 488
ss. 25 (5), 47-8 . . . . .	103
ss. 62-3 . . . . .	97
s. 67 . . . . .	97, 98
s. 68 . . . . .	97
s. 72 . . . . .	98
s. 74 . . . . .	388
s. 77 . . . . .	99
s. 81 . . . . .	102, 388
s. 81 (2) . . . . .	389
s. 114 . . . . .	298
Sch. IV . . . . .	103
London Building Act, 1930 (21 & 22 Geo. 5, c. clviii), ss. 196, 200 . .	202
Architects' Registration Act, 1931 (21 & 22 Geo. 5, c. 33) . . . . .	235, 240, 408
ss. 3, 6 . . . . .	235
s. 7 . . . . .	236
Agricultural Marketing Act, 1931 (21 & 22 Geo. 5, c. 42), s. 6 . . .	245
Local Government (Clerks) Act, 1931 (21 & 22 Geo. 5, c. 45), ss. 1, 2, 4 . . . . .	43
Patents and Designs Act, 1932 (22 & 23 Geo. 5, c. 32) . . . . .	412
Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37), ss. 3-8 . . . . .	239
Town and Country Planning Act, 1932 (22 & 23 Geo. 5, c. 48), s. 10 . .	150
s. 12 (1) . . . . .	154
s. 16 . . . . .	152
s. 17 . . . . .	153
s. 35 . . . . .	152
ss. 36, 40 . . . . .	154
s. 46 . . . . .	155
s. 49 . . . . .	153
Children and Young Persons Act, 1933 (23 & 24 Geo. 5, c. 12), s. 22 . .	162
ss. 37, 39 . . . . .	73
Local Government Act, 1933 (23 & 24 Geo. 5, c. 51), ss. 1, 2, 4 . . .	43
Road and Rail Traffic Act, 1933 (23 & 24 Geo. 5, c. 53), . . . . .	104, 474
s. 6 . . . . .	99
s. 15 . . . . .	106
s. 39 . . . . .	94, 98
Gas Undertakings Act, 1934 (24 & 25 Geo. 5, c. 28), s. 13 . . . . .	146
s. 14 . . . . .	146
Sch. II, Pt. III, s. 6 . . . . .	146
Unemployment Act, 1934 (24 & 25 Geo. 5, c. 29), s. 35 . . . . .	172
s. 39, Sch. VII . . . . .	173
Unemployment Insurance Act, 1935 (25 & 26 Geo. 5, c. 8) . . . . .	453n
ss. 4, 12, 40-42 . . . . .	165
Housing Act, 1935 (25 & 26 Geo. 5, c. 40) . . . . .	397
Restriction of Ribbon Development Act, 1935 (25 & 26 Geo. 5, c. 47) .	457
ss. 1, 2 . . . . .	63
s. 7 . . . . .	63, 457
s. 7 (4) . . . . .	277
Electricity Supply (Meters) Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 20) .	147
Old Age Pensions Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 31), ss. 8-9 . .	174

National Health Insurance Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 32)	117
s. 36	123
s. 161 (1)	118, 119
s. 163	122, 123
s. 164	125
s. 183	128
Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49), ss. 138, 139, 168, 169	111
Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51)	400
s. 25	114
s. 81	115
s. 82	114
Trunk Roads Act, 1936 (1 Edw. 8 & 1 Geo. 6, c. 5)	64
Chairman of Traffic Commissioners (Tenure of Office) Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 52)	97
Trade Marks Act, 1938 (1 & 2 Geo. 6, c. 22)	419
s. 17	139
s. 23	140
s. 32	141, 419
ss. 34, 35, 36	140
ss. 49, 53	141
Architects' Registration Act, 1938 (1 & 2 Geo. 6, c. 54)	235, 240, 408
Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 & 2 Geo. 6, c. 63)	5, 357
Limitation Act, 1939 (2 & 3 Geo. 6, c. 21)	51
Military Training Act, 1939 (2 & 3 Geo. 6, c. 25)	181
Compensation Defence Act, 1939 (2 & 3 Geo. 6, c. 75)	211, 278
ss. 7-9	212
National Service (Armed Forces) Act, 1939 (2 & 3 Geo. 6, c. 81)	181, 193, 474, 490, 493
s. 6 (7)	490
National Service (No. 2) Act, 1941 (5 & 6 Geo. 6, c. 4)	189
Police (Appeals) Act, 1943 (6 & 7 Geo. 6, c. 8), s. 1	143
Town and Country Planning (Interim Development) Act, 1943 (6 & 7 Geo. 6, c. 29), s. 6	151
s. 8	154
Pensions Appeals Tribunals Act, 1943 (6 & 7 Geo. 6, c. 39)	175
Reinstatement in Civil Employment Act, 1944 (7 & 8 Geo. 6, c. 15)	193, 474, 476
ss. 9, 11	194
Education Act, 1944 (7 & 8 Geo. 6, c. 31)	474
ss. 37 (4), 38 (2), 41 (8)	160
s. 67	156
(2)	157
(3)	158
(4)	157
s. 68	159
s. 70	163
s. 71	163, 460
s. 72	164
Sch. VI	163
Town and Country Planning Act, 1944 (7 & 8 Geo. 6, c. 47), s. 34	152
s. 44	154
s. 49	153
Ministry of Fuel and Power Act, 1945 (8 & 9 Geo. 6, c. 19), s. 1 (2), Sch. I	145
Family Allowances Act, 1945 (8 & 9 Geo. 6, c. 41)	177, 474

Furnished Houses (Rent Control) Act, 1946 (9 & 10 Geo. 6, c. 34)	203, 474
ss. 1, 3, Sch.	204
National Insurance (Industrial Injuries) Act, 1946 (9 & 10 Geo. 6, c. 62)	194, 476
ss. 36 (1) (a), 37	198
ss. 42, 43	199
National Insurance Act, 1946 (9 & 10 Geo. 6, c. 67)	117, 177, 474
s. 43	177
(4)	178
(5)	179, 453
National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81)	130, 474
s. 24 (6), (7)	132
s. 34 (8) (b)	131
s. 42	132, 133, 457
s. 47	133
Sch. VI	131
Sch. VII	132
Pt. IV	130



## INTRODUCTION

ONE of the most striking developments in the British Constitution during the past half-century has been the acquisition of judicial power by the great departments of State and by various other bodies and persons outside the Courts of law. These tribunals are not only unconnected with the Courts of law, but are also for the most part outside their control. In many instances the judicature is specifically prohibited by statute from reviewing their decisions or from supervising their activities in any way.

This remarkable movement betokens the existence in the Constitution of Great Britain of a definite body of Administrative Law, or Executive Justice as it is sometimes called, and discloses a breakaway from that Rule of Law which the late Professor A. V. Dicey regarded as an essential feature of the English constitutional system. It has received little attention, either from Dicey or his followers, and for the most part has been passed by unnoticed save for a word here and there in works devoted to other subjects or a protest directed against some particular example. Yet it is obviously a matter of very considerable importance in the government of this country. There is still, it is true, nothing comparable to the system of *droit administratif* which obtains in France and elsewhere; but that need not blind us to the fact that there exists in England a definite and extensive body of administrative law or executive justice which in its own sphere is no less significant.

The aim of this book is to examine in detail the nature and scope of the judicial functions exercised by

government departments and other public and private bodies; to analyse the causes which have led to such power being conferred on informal tribunals of this kind; and to evaluate the advantages and disadvantages which result therefrom. No attempt has been made to deal with such topics as the protection of the Crown from actions for tort, the special immunity conferred on public authorities by certain statutes, and other matters of a similar character, as they do not properly belong to the main subject under discussion, and have no real relevance thereto.

An endeavour has been made to deal with the subject from a wider point of view than the purely legal one. The most fertile field of investigation in the social sciences appears to be presented by the ground which lies between law, economics, political science and psychology, a territory which so far has been almost unexplored. In the present work, which deals primarily with Constitutional Law, it has been found necessary to make considerable excursions into the realms of psychology and political science. The judicial process cannot be understood merely by reference to judicial institutions. Indeed, the element which we value most highly in our judicial system is something which is based less on external organisation than on mental processes. What I have been concerned with in the main has been to discover what are the essential conditions, psychological as well as institutional, which must be fulfilled if the ends of justice are to be served, rather than to pay tribute to any particular form of judicial organisation or structure. That being so, I have not approached the study of administrative justice with any ready-made assumption that every tribunal which does not at the moment form part of the recognised

system of judicature must necessarily and inevitably be arbitrary, incompetent, unsatisfactory, injurious to the freedom of the citizen and to the welfare of society. Such an attitude would betoken the narrowest type of legalism. I have attempted rather to understand the reasons which have led to the setting up of these Administrative Tribunals, to comprehend what services it was felt they could render beyond the power of the Courts of law, and to ascertain whether they in fact perform their functions in a satisfactory manner.

There can be no doubt that the rise of Administrative Law is mainly due to the vast extension in the work of government which has taken place in England during the past few decades, and to the rapid increase in power of the executive which has accompanied that extension. The traditional Court system, in which isolated individuals contest disputed rights of property or person, has been superseded by an entirely new type of judicial process so far as concerns controversies arising in connection with the great new social services undertaken by the State. Executive justice, far from being a temporary and accidental intrusion into the mellowed sanctity of the British Constitution, is inherently connected with modern social evolution and is a feature of the governmental order likely to grow extensively during the present century. Administrative Tribunals will, I venture to predict, become of increasing importance as adjudicating bodies in disputes concerning a large number of economic and social affairs. I therefore suggest that it behoves us to pay careful attention to a movement which has already assumed considerable proportions. If we are to have a body of Administrative Law, it should at least be a good one. So much will be conceded by even the most active

opponents of constitutional change. I have myself gone further than mere description and have sought to discover what principles, if any, should go to the making of a sound body of Administrative Law. The reader will find a number of recommendations intended to be of practical value at the end of the book.

So rapid is the development of Administrative Justice at the present time that even as this book goes to press various changes in the existing body of Administrative Law are either adumbrated or actually in course of taking place. Let me say, therefore, that although this work is based on a mass of detailed observation which, it is hoped, was accurate at the time when it was made, I have in the main been more fundamentally concerned with prevailing tendencies than with the exact detailed position existing at any given moment, more interested in the underlying substance than with the changing content. Hence I venture to believe that relatively slight variations in the actual phenomena will not vitally affect the general principles which I have ventured tentatively to suggest.

My obligations to various writers will be apparent from the text. . . .

I cannot conclude this acknowledgment of those who have helped me without paying a tribute to the work of some of the distinguished jurists and Judges whose brilliant writings the United States of America is giving to the world. I have in mind particularly Dean Roscoe Pound's *Spirit of the Common Law*, Mr. Justice Cardozo's *Nature of the Judicial Process*, Mr. Gerrard Henderson's *Federal Trade Commission*, and the works of President Frank J. Goodnow of Johns Hopkins University, and Professor Freund of the University of Chicago. I believe that no more brilliant literature concerning the problems

of law in relation to modern life is to be found than that which is emerging from the constellation of theoretical jurists and practising lawyers who dwell across the Atlantic and whose work enriches not merely their own country but the whole civilised world.

W. A. R.

The Temple, London, E.C.4.

*October 1927.*

## CHAPTER 1

### ADMINISTRATIVE AND JUDICIAL POWER

The Distribution of the Power to Decide—The Functions of Government—The Legendary Separation of Powers—The Administrative Functions of Judges—The Judicial Functions of Administrators—Administrative Law in England—The Hegemony of the Executive—Conclusion.

#### THE DISTRIBUTION OF THE POWER TO DECIDE

THE enormous number of decisions which are made each day by every normal adult member of the human race revolve around an infinite diversity of subjects and present an immense variety of type and method of generation. The one essential feature common to them all is the fact that they represent a choice made between what appear to be available alternatives, a resolution arrived at to adopt or pursue a certain course, the selection of a particular path. As society develops and life becomes more highly organised, the field of possible alternatives extends; and the matters which have to be decided increase not only in number but in complexity. Often a kind of interlocking mesh of decisions can be seen to exist. An agricultural labourer may decide to send his son to be a skilled engineer; but whether the boy is able to earn his living in that occupation, or even enter it, will depend on a whole series of decisions made by capitalists and managers and trade union officials and investors and consumers, not one of whom may be known to him personally, concerning the kind and quantity of commodities they are willing or able to produce and consume, and the particular manner in which the industry shall be organised.

Civilisation has in all ages required that the power to decide certain classes of questions should be placed in

the hands of recognised public authorities whose decisions should be enforced. This is the basis of all government. The distribution of power in this manner has, throughout history, been maintained sometimes by the consent of those subjected to its sway, sometimes by the might of arms; more often by a mixture of both. With the growth of Western civilisation the idea has developed, although it has not always been applied, that the public welfare should be the dominant consideration affecting the persons or groups to whom the power of deciding and enforcing certain questions has been entrusted or by whom it has been grasped.

It is the removal in this way of certain matters from the domain of private interest, private desire, and private action to the realm of disinterested control in the common weal that is connoted by such phrases as 'the reign of law' and so forth. For ultimately there can be no reign of law without the supersession of private decision and a submission to the judgment of recognised authorities, whether executive, judicial, or legislative. Controversy often runs high nowadays as to exactly what matters should be so dealt with; but behind the controversy lies a solid base of agreement (from which the Anarchist alone dissents) that at any rate certain affairs fundamental to the life of society should be so treated. Not even the last surviving believer in *laissez faire* would now propose that the task of deciding whether a man had committed a crime and of determining the suitable punishment should be left to the unfettered decision of the individual directly injured thereby. The business of keeping the peace is an industry which everyone agrees should be nationalised.

The maintenance of security against aggression from without, and the keeping of the peace between man and man within the realm are historically the first functions of government; but, as society has developed, those

functions have gradually extended from one sphere of activity to another, until we find ourselves confronted with that mass of regulation and interference on the part of the governing authority which is the special mark of the twentieth century industrial State. A public authority of one kind or another has now been set up in the public interest to decide, not only whether a man suspected of murder actually committed the crime or not, or how the military and naval forces of the country shall be disposed, but also such questions as what antiquities shall be purchased out of public money for the British Museum, what individuals shall be permitted to vivisection animals, what hours of overtime women in factories shall be allowed to work, and so on *ad infinitum*. The power to decide these and countless other questions has nowadays been given to individuals or groups of individuals who have been elected or appointed to public offices of one kind or another.

Behind the power to decide possessed by these governing authorities there lies the power to enforce the decision, if necessary by means of the organised force of the community.

It is obvious that civilised society could not continue to exist for very long if the affairs whose determination lies in the hands of public authorities were decided by individuals who relied solely on their instincts, or on the haphazard intuitive impulse of the moment. From early times men have demanded that certain kinds of questions should be decided by a process which was comparatively regular, stable, certain, more or less consistent, and from which self-interest and emotion were as far as possible eliminated. It was in regard to the punishment of crime and the settlement of disputes involving violence that this process was first applied; and it is therefore in this field that the judicial function makes its earliest appearance. The most definite popular notion of a judicial proceeding



is still the trial of a man for a grave breach of the peace, such as murder. The scarlet robes of the judge, the haggard face of the prisoner, the easily followed story of passion or revenge, with its dramatic culmination and simple motives, the relentless cross-examination of the female witnesses—this is the sort of image, replete with picturesque circumstance and morbid detail, which for centuries has appealed to the man in the street as representing the very quintessence of all that is ‘judicial’.

#### THE FUNCTIONS OF GOVERNMENT

But the business of trying criminals, and, indeed, the entire work of the judiciary in settling disputed questions, is only one of the functions of government, and possibly not even the earliest at that. There is also, as everyone knows, the business of legislation, or law-making, and that of administration, or the regulation of public affairs and the conduct of public services. To attempt to describe the intricate system of government which exists in a modern State in terms of this simple trinity of powers is to run the danger of reducing a complex truth to a simple falsehood; but though the classic formula is profoundly unsatisfactory, it is difficult to find a series of categories which is more comprehensive. Nevertheless, it is probably the fact that some functions of government are not capable of classification into legislative, executive and judicial powers.

It is very difficult to discover any adequate method by which, in a highly developed country like England, judicial functions can be clearly distinguished from administrative functions. Mere names are of no avail, for, as we shall see, judges often administer, and administrators often judge. It is easy enough to take a typical example of each kind of function, and to identify it as belonging to a particular category. But that does not

get us out of the difficulty, unless we can extract from it some characteristics essential to its nature. A further difficulty arises from the fact that many of the features which once belonged almost exclusively to activities that were carried on only in courts of law, are now to be observed as attaching also, to a greater or less extent, to activities carried on by other departments of government. Furthermore, what we may call the judicial attitude of mind has spread from the courts of law, wherein it originated, to many other fields, with the result that an increasingly large number of governmental activities bear the marks of both the administrative process and the judicial process, and cannot be distinguished by any simple test. ✓ The changing combinations of events will beat upon the walls of ancient categories; a distinguished American judge has observed; and that is precisely what has occurred in the classification of governmental functions in England.

Lawyers, of course, have often had to decide, in practical cases arising in the courts, whether a particular activity was of a judicial or an administrative (or 'ministerial') character; and important consequences have flowed from their decisions.<sup>1</sup> But those decisions disclose no coherent principle, and the reported cases throw no light on the question from the wider point of view from which we are now discussing it save to demonstrate, by the very confusion of thought which they present, the difficulty of arriving at a clear basis of distinction. Guardians of the Poor, for example, in determining to grant superannuation to the master of a

<sup>1</sup> The orders of prohibition and certiorari will lie only in respect of judicial acts, and not for those of an administrative or 'ministerial' character. These orders have succeeded the ancient prerogative writs of these names, which were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938. Many of the cases have turned on whether one or other of these ancient writs or modern orders would issue in respect of the act complained of, in order to subject the matter to the scrutiny of the court. See G. Stuart Robertson, *Civil Proceedings by and against the Crown*; Short and Mellor, *Practice of the Crown Office*.

workhouse, and the Local Government Board, in giving their consent, were held in law to have acted in a judicial capacity, on the ground that they were deciding a question of right and that their decision imposed a pecuniary liability on the ratepayers.<sup>2</sup> In another case in which the Local Government Board for Ireland was concerned, an order constituting a district in Ireland a township was treated as being a judicial act because the determination of the boundaries of the proposed town involved taxation and a code of local laws to those living within the prescribed limits.<sup>3</sup> The action of a chief gas examiner appointed by the London County Council, in affirming a report made by one of his assistants concerning the deficiency of illuminating power in the gas supplied by a producing company, was held to be a judicial act on the ground that the report was 'virtually a judgment, being final (by statute) and the basis for future proceeding'.<sup>4</sup> In another case the duties of the Minister of Labour, in deciding under statutory authority various questions relating to unemployment insurance, were held to be judicial on the basis that the questions referred to were either questions of law or questions of fact and 'their determination involves no element of discretion'.<sup>5</sup> In one important case which came before the House of Lords, Lord Herschell expressed the opinion that in view of the fact that an objector who opposes the grant of a liquor licence by justices sitting as a confirming authority is expressly made a party to litigation by statute, the latter proceedings are *therefore* judicial, for there is a *lis inter partes*.<sup>6</sup>

<sup>2</sup> *R. (Bryson) v. Lisnaskea Poor Law Guardians*, [1918] 2 Ir.R. 258.

<sup>3</sup> *The Queen (Dixon) v. Local Government Board* (1878), 2 L.R.Ir. 316.

<sup>4</sup> *The Queen v. L.C.C.* (1895), 11 T.L.R. 337.

<sup>5</sup> *Society of Accountants in Edinburgh v. Lord Advocate*, [1924] W.C. & Ins.Rep. 285.

<sup>6</sup> *Boulter v. Kent Justices*, [1897] A.C. 569; *R. v. Manchester Justices*, [1899] 1 Q.B. 571; *R. v. Sharman*, [1898] 1 Q.B. 578; *R. v. Woodhouse and Others (Leeds Justices)*, [1906] 2 K.B. 501, 512.

More recently, the House of Lords decided that an examination of the affairs of an industrial assurance company by the Industrial Assurance Commissioner, or an inspector appointed by him, under statutory authority for the purpose of reporting on the position of the company, is not a judicial proceeding. The inquiry is, in consequence, not to be held in public.<sup>7</sup>

Perhaps the most exhaustive discussion of the judicial function which has taken place in court is to be found in *Shell Company of Australia v. Federal Commissioner of Taxation*.<sup>8</sup> The question in issue was whether the Board of Review which had been set up in 1925 under Commonwealth income tax legislation was a court exercising the judicial power of the Commonwealth. If so, certain limitations concerning the tenure of office of the Board's members might have been unconstitutional. The High Court of Australia had decided by a majority that the Board of Review was an administrative tribunal, and hence objections of this kind were not well founded. The judicial committee of the Privy Council unanimously upheld this judgment. Lord Sankey, the Lord Chancellor, on behalf of all the members of the judicial committee, said that their Lordships accepted as one of the best definitions of judicial power that given by Chief Justice Griffith in another Australian case.<sup>9</sup> It means, the chief justice had said, 'the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.' The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon

<sup>7</sup> *Hearts of Oak Assurance Co., Ltd. v. Att.-Gen.*, [1932] A.C. 392.

<sup>8</sup> [1931] A.C. at p. 283.

<sup>9</sup> *Huddart, Parker & Co. v. Moorehead*, 8 C.L.R. 330, 357.

to take action'.<sup>1</sup>) The orders of the Board of Review were not conclusive for any purpose whatever.<sup>1</sup>

Lord Sankey remarked that the decided cases show that there are tribunals which possess many of the trappings of a court but which, nevertheless, are not courts in the strict sense of exercising judicial power. Mere externals do not make a direction by an ad hoc tribunal to an administrative officer an exercise by a court of judicial power.

So far, so good. If the Lord Chancellor's speech had ended at this point we might have had a fairly clear judicial definition of judicial power. Its essential characteristic would have been the authority to decide controversies and to determine rights relating to life, liberty or property. But any hope of so lucid an exposition was dashed to the ground by the following series of negative propositions which Lord Sankey saw fit to make<sup>2</sup> :—

- (1) A tribunal is not necessarily a court in the strict sense because it gives a final decision ;
- (2) Nor because it hears witnesses on oath ;
- (8) Nor because two or more contending parties appear before it between whom it has to decide ;
- (4) Nor because it gives decisions which affect the rights of subjects ;
- (5) Nor because there is an appeal to a court ;
- (6) Nor because it is a body to which a matter is referred by another body.

The judicial committee may have had some good reason for formulating this series of negative propositions,

<sup>1</sup> The powers of the Board of Review contrasted strongly with those of the Board of Appeal set up by the Australian Income Tax Assessment Act, 1922, which had been adversely criticised as invalid in *British Imperial Oil Co. v. Federal Commissioner of Taxation*, 35 C.L.R. 422. The Board of Appeal's orders were declared final and conclusive on questions of fact by the enabling Act.

<sup>2</sup> [1931] A.C. at p. 297.

though their purpose is not clear. But the effect of doing so is to destroy the sense of the positive parts of Lord Sankey's speech. For we are first told that the essence of judicial power is the power to make a binding decision, and in the next breath that a tribunal possessing this power is not necessarily a court in the strict sense. What, then, is a court in the strict sense? Not one, we had been told, which possesses the mere trappings of a court. Perhaps the correct inference is that a court must possess both the trappings and the substance of judicial power. If so, it should surely have been explicitly stated. The essential weakness of the analysis is that at one moment it is dealing with 'judicial power' and at another with 'courts in the strict sense' without making clear whether these are identical or distinct things. The present Master of the Rolls (Lord Greene) had argued for the appellants that a tribunal may exercise judicial power although it also exercises administrative power,<sup>3</sup> but it is not apparent whether the judicial committee accepted or rejected this contention.

No less diverse and inconsistent, on the other hand, have been the grounds on which the courts have decided that certain types of activity are of an administrative character. Thus, in a leading case decided in the middle of the eighteenth century, the issue of a warrant by a justice of the peace ordering a constable to deliver up to certain persons a horse that had been seized, was held to be a 'ministerial' act because the justice had no choice in the matter.<sup>4</sup> Eighty years later the issue of a distress warrant to levy the poor rate was held to be an administrative act, and the court suggested that this ruling applied to warrants of every kind, because they are not conclusive proof of any of the facts stated in

<sup>3</sup> *Shell Company of Australia v. Federal Commissioners of Taxation*, [1931] A.C. at p. 279.

<sup>4</sup> *R. v. Lediard* (1751), Sayer's Reports, p. 6.

them.<sup>5</sup> In a later case concerning a certificate of innocence which magistrates were required by statute to issue to persons improperly charged with committing an assault or battery, the lack of discretion available to the magistrates, as to whether or not they would issue the certificate, was again made the reason for regarding their action as administrative.<sup>6</sup> In 1884, in another case concerning the issue of a distress warrant for the poor rate, Lord Justice Brett, M.R., speaking of the action of the justices of the peace, said their act was a ministerial one because 'there was nothing which entitled them to do anything but issue it'.<sup>7</sup> No other judge had gone so far in identifying administrative acts with an absence of discretion. But at the beginning of the present century, Lord Alverstone, C.J., in deciding that an appointment by justices of a clerk is not a judicial act, observed that 'the fact that justices have to exercise their discretion is not the test whether the act is judicial or not'—a statement which was clearly inconsistent with the earlier decisions.<sup>8</sup>

In Ireland the judges had for many years been basing their opinions on other grounds. Thus, an inquiry by the local government board as to the wisdom or propriety of making a provisional order concerning the water supply of an Irish town was held to be an administrative act. The board was not acting judicially, because a provisional order is not valid in itself, and does not impose an obligation on anyone, and thus it is 'not a "determination" sufficient to erect into a court the body empowered to make it'—a somewhat circular argument which results in placing the court before the case.<sup>9</sup> In another Irish case the examination by a district auditor of the accounts of a poor law union was held to be an administrative

<sup>5</sup> *Ex p. Taunton* (1893), *Dowling's Reports on Points of Practice*, p. 55.

<sup>6</sup> *Hancock v. Somes* (1859), 1 El. & E. 795.

<sup>7</sup> *R. v. Marsham* (1889), 50 L.T.R. 142.

<sup>8</sup> *R. v. Drummond* (1903), 88 L.T. 833.

<sup>9</sup> *Re L.G.B., ex p. Kingstown Commissioners*, 16 L.R.Ir. 150.

proceeding, on the ground that the auditor's certificate is not a conclusive declaration that the accounts are in order, which finally determines the matter once and for all.<sup>1</sup> In an English case which followed shortly afterwards, *Mr. Scrutton* (later *Scrutton, L.J.*) argued that the Watermen's Company on the river Thames, in hearing applications for licences from men desirous to act as watermen or lightermen, are acting administratively, and not judicially, because 'they have no power to administer an oath'.<sup>2</sup>

It is obvious from these examples—and they are fair specimens—that the decisions of the courts as to which functions are judicial and which are administrative have not proceeded on any consistent principle; and we cannot look therefore to the recorded cases for any real assistance in distinguishing judicial from administrative power. It has been said with some truth that the courts have never acknowledged their failure to find a satisfactory definition of judicial proceedings. They have, however, 'to some extent atoned for their failure by ignoring the only definitions that they have been able to formulate, and have thus escaped further confusion at the price of consistency'. Accordingly, they distinguish in practice judicial from administrative functions even though their own definitions of the former embrace the latter, and even though most judges could not really analyse the distinction.<sup>3</sup>

In the United States of America confusion is even worse confounded. In the States of Alabama, Massachusetts and Michigan, for example, the courts have held that the action of commissioners of highways or of a city council in laying out highways and streets is judicial. In

<sup>1</sup> *The Queen v. Guardians of the Omagh Union*, 26 L.R.Ir. 619, at p. 625.

<sup>2</sup> *R. v. Waterman's Company*, [1897] 1 Q.B. 659. This case is not well reported.

<sup>3</sup> D. M. Gordon, 'Administrative Tribunals and the Courts', 49 L.Q.R. 105.



Maine and New Hampshire, on the other hand, this same act has been regarded as being of a non-judicial character when performed by the selectmen of a town, but is judicial when done by a court of sessions or a county court. Thus the determining factor here is the nature of the body performing the function; and an act which is of an administrative character if done by one authority is 'metamorphosed into a judicial act' when done by another.<sup>4</sup>

There does not appear to be any conclusive test by means of which judicial activities can be infallibly distinguished from administrative activities, very largely because there is no sharp dividing line between the two. Judicial administration, as the late Lord Stamp pointed out, is merely a specialised form of general administration which 'has acquired an air of detachment'. Some judicial administration is still in process of acquiring the air of detachment; and not a little more is still embedded, as it were, in the original clay of general administration. Both administrative and judicial powers can, however, be projected on to a common plane of governmental authority. At one end of the scale judges are making certain decisions under conditions and by methods which we can clearly recognise as being of a judicial character. At the other end of the scale public officers are performing certain other acts which are marked by equally distinct features of their own; and these we can call administrative functions. Both extremes are situated on the same plane, as it were; and midway between them is a large and important territory which is occupied by a great mass of governmental bodies which, though not judicial in name or outward appearance, are nevertheless discharging functions of a judicial nature. These we may call administrative tribunals.

<sup>4</sup> Frank J. Goodnow, 'The Writ of Certiorari', 6 *Political Science Quarterly*, 507-510; cf. *People v. Mayor*, 5 Barb. 43.

Farther down the scale we find yet another series of authorities exercising a jurisdiction over a whole mass of controversial matters relating to the membership of clubs, friendly societies, trade unions and professional or vocational associations. In this realm we shall also find the agricultural marketing boards and other bodies of a similar type set up under statutory authority. These we may call domestic tribunals. They also, we shall find, perform duties which partake to a marked degree of the nature of judicial functions, though they do not possess the features which we expect to find in a formal court of justice.

With so delicately graded a scale of authorities it is scarcely surprising if we find it difficult to discover an infallible test which shall immediately tell us which functions are judicial and which administrative. (It is, however, necessary for practical purposes to have some kind of a classification; and we may accordingly suggest that the primary characteristics of 'pure' judicial functions, by whomsoever exercised, are:—

- (1) The power to hear and determine a controversy.
- (2) The power to make a binding decision (sometimes subject to appeal) which may affect the person or property or other rights of the parties involved in the dispute.

Administrative functions, on the other hand, consist of those activities which are directed towards the regulation and supervision of public affairs and the initiation and maintenance of the public services.)

#### THE LEGENDARY SEPARATION OF POWERS

While we accept, subject to the foregoing qualifications, the three powers of administration, legislation and judicature as designating somewhat imperfectly the chief functions of government, it does not by any means follow

that we must consign ourselves to that antique and rickety chariot known as the separation of powers, so long the favourite vehicle of writers on political science and constitutional law for the conveyance of fallacious ideas.

The doctrine of the separation of powers is stated in *The Mechanism of the Modern State*, by the late Sir John Marriott, M.P. for York and a lecturer in political subjects at Oxford, as follows: 'Today, in all civilised states, the three functions of government are clearly distinguished, and each function is assigned to its appropriate organ'. After describing the functions of government and the 'appropriate organs' in the conventional way, he then remarks that 'the principle of the separation of powers being then generally admitted', and the differentiation of function having been largely carried out, all that remains is to consider in further details the various problems which arise in connection with the legislative, the executive and the judiciary.<sup>5</sup>

The division of powers enunciated in this theory, and their allocation to separate branches of the government has, at no period of history borne a close relation to the actual grouping of authority under the system of government obtaining in England<sup>6</sup>; but the conception has

<sup>5</sup> Vol. 1, pp. 386-387. See also J. A. R. Marriott, *English Political Institutions*, 2nd ed., p. 43, for an expression of similar views by the same author. See also F. J. Goodnow, *Comparative Administrative Law*, Vol. 1, pp. 22-23.

<sup>6</sup> The doctrine of the Separation of Powers was stated in the following unqualified form by Sir William Holdsworth in the original edition of *Halsbury's Laws of England*, which appeared in 1909: 'The sovereign power, or government of the country, comprises the legislature, or body which makes the laws, the executive, or authority which carries the laws into effect so far as they relate to the public services, and the judiciary, which enforces the due observance of the law' (Vol. 6, p. 317). In the Hailsham edition of *Halsbury*, published in 1932, this passage was omitted by Sir William Holdsworth and he declared instead that the important doctrine of the separation of powers 'has never to any great extent corresponded with the facts of English government . . . it is not the case that legislative functions are exclusively performed by the legislature, executive functions by the executive, or judicial functions by the judiciary' (2nd. ed., Vol. 6, p. 385).

nevertheless exerted a great influence in confusing the minds of men both at home and abroad. Nowhere has this been more clearly demonstrated than in the United States. In America, owing to the adoption of written constitutions and to the inclusion in them of the doctrine of the separation of powers to its full extent, 'it has been a fundamental principle that every governmental function or power can and must be classified as either executive, legislative or judicial, must be assigned to its proper department and be exercised there, and that any attempt to give it to a different department, or to mingle powers belonging to two or more departments . . . is unconstitutional and void'.<sup>7</sup> Such a rigid separation of governmental functions has, it is admitted, proved 'impracticable'.

And 'impracticable', indeed, such a separation has proved throughout English history. We are not here dealing with legislative functions; but so far as administrative and judicial activities are concerned, the stony path of past events is as merciless to the fatigued doctrine of the separation of powers as are the facts of the present. 'The very word 'court', which today we associate so closely with the administration of justice, signifies etymologically the King's palace or residence, a place which was primarily the seat of executive power.'<sup>8</sup> Before the end of the twelfth century the King's Court had become the dominant governing authority in England. It consisted of a highly organised body of trained officials who toured the country, returning to the King's head-

<sup>7</sup> 'Administrative Tribunals' by Warren Pillsbury, 36 *Harvard Law Review*, p. 405. An example of this is to be found in the Constitution of the State of California, which lays it down that 'The powers of the government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others' (Art. 3, s. 1). See also H. J. Laski, *Grammar of Politics*, p. 295.

<sup>8</sup> Jacob, *Law Dictionary*; *Halsbury* (Hailsham Edition), Vol. 8, p. 525

quarters after each visitation. ✓ This court was financial, administrative and judicial.<sup>9</sup>

By the end of the mediaeval period the King's Council was coming to be regarded mainly as an administrative body. 'But as yet', the late Professor Holdsworth observed, 'the boundaries between executive functions, on the one hand, and judicial and legislative functions, on the other, were very indistinct.'<sup>1</sup> Gradually, under the pressure of the large amount of judicial work which was placed on the council, it began to split into two parts—a judicial court and an administrative council. The growth of our judicial system may thus be regarded historically as the transference to parts of the King's Council of judicial powers originally exercised by the King in council<sup>2</sup> and intermingled with other functions.

In the sixteenth century the common law courts began to wane before the fierce challenge of the executive part of the King's Council. Lawyers began to complain, Dean Pound tells us, that the common law was being set aside. Little important business came to the King's courts of law. ✓ The living law shifted to the King's Council, in the Star Chamber, in the Court of Requests, and in the Court of Chancery—all of them at that time what we should now call administrative tribunals. 'It seemed that judicial justice, administered in courts, was to be superseded by executive justice administered in administrative tribunals or by administrative officers.'<sup>3</sup> In the sixteenth century, as in the twelfth, it was clearly impossible to draw a line between judicial and administrative functions.<sup>4</sup>

✓ The seventeenth century witnessed the ascendancy of the justice of the peace. The small group of country gentlemen who were appointed to keep the peace and to

<sup>9</sup> E. Jenks, *Law and Politics in the Middle Ages*, p. 38.

<sup>1</sup> W. S. Holdsworth, *History of English Law*, Vol 1, pp. 478-479; F. A. Inderwick, *The King's Peace*, pp. 50, 51, 70, 91.

<sup>2</sup> A. V. Dicey, *Law of the Constitution* (9th ed.), p. 376.

<sup>3</sup> Roscoe Pound, *Spirit of the Common Law*, p. 73.

<sup>4</sup> Cf. Holdsworth, *History of English Law*, Vol. 1, p. 502.

arrest wrongdoers gradually acquired an extraordinary collection of judicial and administrative duties which Maitland thought no theorist would attempt to classify, since their rich variety was 'not the outcome of theory, but of experience'.<sup>5</sup> The justices themselves certainly made no attempt at classification. In the Justices' Court of Sessions, Mr. and Mrs. Webb point out, 'neither the individual magistrate nor the Divisional Sessions made any distinction between (1) a judicial decision as to the criminality of the past conduct of particular individuals; (2) an administrative order to be obeyed by officials; and (3) a legislative resolution enunciating a new rule of conduct to be observed by all concerned. All alike were, in theory, judicial acts. Though many of the orders were plainly discretionary, and determined only by the justice's views of social expediency, they were all assumed to be based upon evidence of fact, and done in strict accordance with law'.<sup>6</sup> Not only were the duties of the local justice miscellaneous in character, but the business of the royal judges themselves included a considerable amount of administrative work. It was part of their duty when on assize, particularly during the first half of the seventeenth century, to supervise the local justices in carrying out the directions of the Privy Council, and to enforce the authority of the council in administrative affairs by the issue of peremptory orders when necessary.<sup>7</sup> There was, in fact, no distinction drawn between judicial and administrative business, and the King's Bench controlled the administration of government as well as that of justice.<sup>8</sup> Dr. Gibbon, giving evidence on behalf of the Ministry of Health before the Royal Commission on Local Government, observed that 'the mixture of administrative

<sup>5</sup> F. W. Maitland, 'The Shallows and Silences of Real Life', *Collected Papers*, Vol. 1, p. 470.

<sup>6</sup> Sidney and Beatrice Webb, *English Local Government—The Parish and the County*, p. 419. See also their *English Poor Law History*, Part 1, p. 89.

<sup>7</sup> S. and B. Webb, *History of Liquor Licensing in England*, p. 12.

<sup>8</sup> Frank J. Goodnow, 'Certiorari', 6 *Political Science Quarterly*, p. 498.

and the judicial was characteristic of English local government right down to the nineteenth century'. The justices exercised both functions, and it would have been difficult at times to distinguish between them.<sup>9</sup>

This mingling of administrative and judicial powers in a single authority arose quite naturally as a matter of convenience. Save when it gave rise to notorious tyranny, as in the case of the Star Chamber, it evoked no comment and drew forth no protestation. The great majority of citizens were, indeed, unconscious that there was any lack of constitutional neatness and logical order in the prevailing governmental arrangements; for until Montesquieu misread the English system in that most famous chapter of his *Esprit des Lois* (Book XI, chap. vi), the divine right of powers to be separated had hardly been asserted. What had actually happened was that in early times all the functions of government, whether legislative, administrative or judicial, had resided in an almost undifferentiated form in certain authorities. Then gradually the settlement of disputes (and we must remember that in English law this includes criminal trials, which take the form of a controversy between individuals) was handed over to be decided by certain high officers called judges, and a characteristic formal procedure for dealing with these affairs was elaborated side by side with the evolution of certain legal doctrines and methods of thought. Of the principles underlying this development and the psychological processes which accompanied it, we shall have more to say hereafter. What we are concerned to point out now is that the separation of administrative from judicial functions never even approached completeness. In some cases an officer who was primarily an administrator would, in the course of time, gradually

<sup>9</sup> Royal Commission on Local Government, 1923, Minutes of Evidence, Part I, M. 39, p. 20.

acquire judicial duties, as in the case of the sheriff<sup>1</sup>; in others it was the judge who was turned administrator, as in the case of the justice of the peace. Sometimes the administrative and judicial functions of an office have been so inextricably blended that it is wellnigh impossible to say which capacity is the dominant one. The work of the coroner, for example, who holds the most ancient royal office in England, is, according to Blackstone, 'either judicial or ministerial; but principally judicial'.<sup>2</sup> In the ordinary work of inquiring into the circumstances where people appear to have suffered a violent or unnatural death, the coroner sits as a court with a jury, and in law performs judicial functions by judicial methods; but he also possesses administrative authority to act as the *locum tenens* of the sheriff in certain events. The returning officer, again, who is responsible for the conduct of Parliamentary elections is to some extent an administrative official, 'but he is not so to all intents and purposes', as Lord Abbott, C.J., observed in one case; 'neither is he wholly a judicial officer, his duties are neither entirely ministerial nor wholly judicial, they are of a mixt nature'.<sup>3</sup>

#### THE ADMINISTRATIVE FUNCTIONS OF JUDGES

When we come to the present day, we find a mingling of functions more extensive than any that has existed since the sixteenth and early seventeenth centuries. Consider,

<sup>1</sup> Francis Bacon, *Law Tracts*, p. 190: 'Office of Constable. Every shire hath its sheriff . . . : his function or office is twofold: (1) Ministerial, (2) Judicial. As touching his ministerial office, he is the minister and executioner of all the process and precepts of the courts of law. . . . As touching his judicial office, he hath authority to hold two separate courts of distinct nature . . . wherein he doth enquire of all offences perpetrated against the common law. . . .'

<sup>2</sup> Blackstone, *Commentaries*, 8th ed., I, ch. 9 (2), p. 348. See also Sir E. Troup, *The Home Office*, p. 91.

<sup>3</sup> *Cullen v. Morris* (1819) 2 Stark. N.P.C. 577; Abbott, L.C.J., at p. 587. Cf. *Ackers v. Howard* (1886), 16 Q.B.D. 739; *The Queen v. Collins* (1876), 2 Q.B.D. 30.



for example, a few of the administrative functions of judges.

An obvious and important example of a high judicial officer who is almost daily responsible for the execution of administrative acts is the Lord High Chancellor of England. The Lord Chancellor for the time being sits as the presiding judge in the highest court in Great Britain, the House of Lords; as a member of the Cabinet he participates in, and shares responsibility for, the entire executive action of the government of the day, and may assist in drafting its bills; while as head of the formal judicial system of the country he performs a vast number of administrative acts, such as appointing the county court judges, and the masters and clerks of all the courts.<sup>4</sup> He also disposes of many church livings to Anglican clergymen.

This blending of function in the person of a single office-holder is not confined to the Lord Chancellor, but extends to all the puisne judges of the High Court. For example, the jurisdiction of a judge when dealing with wards of court or lunatics is 'parental and administrative',<sup>5</sup> and the court sits primarily to guard the interests of the ward or the lunatic. The disposal of controverted questions is only incidental and may not be involved at all. Thus, a considerable part of the jurisdiction of the court over a lunatic is concerned with authorising the sale, charging, mortgaging or disposal of the property belonging to the lunatic for the purpose of discharging debts or providing for his upkeep,<sup>6</sup> and these and many other cognate acts are obviously of an administrative nature.

<sup>4</sup> Report of the Machinery of Government Committee, Cmd. 9230/1918, pp. 63 *et seq.* The Lord Chancellor acts also in a legislative capacity, but an examination of that part of his work is outside the scope of the present work.

<sup>5</sup> *Scott v. Scott*, [1913] A.C. 417; Haldane, L.C., at p. 437.

<sup>6</sup> Lunacy Act, 1890, s. 117; Rules in Lunacy, 1892, r. 123; Archbold, *Lunacy*, 5th ed., p. 147.

The powers of a High Court judge over a ward of court are even more varied and in many respects more extensive than are his powers over lunatics.<sup>7</sup> Thus, the education and upbringing of a child who is a ward of court are under the direct control of the court, and the guardian must apply to the judge in chambers from time to time for directions.<sup>8</sup> The court will decide in what religion a ward ought to be brought up, and whether the guardian may change even his own religion without being removed from the guardianship. It is obvious that a judge, in deciding whether it is for 'the benefit of the infant' that he should be brought up as a Protestant, rather than a Roman Catholic, is performing an administrative act, even though his decision is based on such objective facts as the religion of the parents.<sup>9</sup> The court, again, exercises complete authority over the marriage of a ward of the court. A ward may not marry without the consent of the judge; and to do so is contempt of court on the part not only of the ward but of the other party to the marriage and anyone who connives or assists at bringing about the marriage. Imprisonment is a recognised punishment for contempt of this kind, and committal for this offence takes place to this very day.<sup>1</sup> In the past, successive judges have declared certain marriages to be unsuitable,<sup>2</sup> and in particular those in which there is a considerable inequality of age, rank and fortune between the ward and the person whom he or she intends to marry or has in fact married; but it is difficult to feel that the function of the judge in consenting to a marriage is substantially an act of a more judicial nature, in the ordinary sense of the word, than is that of the

<sup>7</sup> Simpson, *The Law of Infants*, 4th ed., p. 164; *Halsbury's Laws of England* (Hailsham Edition), Vol. 17, pp. 717-21.

<sup>8</sup> Simpson, *op. cit.* p. 260.

<sup>9</sup> *F. v. F.*, [1902] 1 Ch. 688.

<sup>1</sup> *Re H.'s Settlement, H. v. H.*, [1909] 2 Ch. 260.

<sup>2</sup> Simpson, *op. cit.* p. 178. See cases cited therein.

natural parent, whose place he has taken, when engaged in a similar task.<sup>2</sup> This part of the work of a judge is, in fact, entirely administrative in character, though he may bring to bear on it a particular attitude of mind derived from his judicial experience.

Passing from the judges of the High Court to the judges of the inferior courts, we can see that, although the work of the justices of the peace is now in the main judicial, certain duties of an administrative nature have still to be carried out by those who comprise the little army of what has for long been called 'the great unpaid'.

The development of local government in England during the nineteenth century led to a great curtailment of the administrative work which, during the preceding two centuries, had fallen into the hands of the justices. The coming of the industrial revolution, which resulted in the haphazard massing of huge numbers of men, women and children in towns almost entirely unprovided with what we regard today as essential services, gave rise to a series of new local government problems which the justices were wholly unfitted to solve. The need for adequate sanitary, police, highway and education services led to the reform of the old municipal boroughs and to the establishment, at first of special ad hoc bodies such as the local boards of health and the highway authorities, and later to the setting up of the new general local authorities, such as the district councils and the parish and county councils.<sup>3</sup> This development resulted in most of the administrative duties of the justices of the peace being transferred to the new and more democratically elected bodies.<sup>3</sup>

<sup>3</sup> See, for example, Local Government Act, 1888, s. 3. According to Dr. Gibbon, the official witness of the Ministry of Health, the establishment of representative bodies for local government in the nineteenth century for the first time drew a line of demarcation between judicial and

In connection with two important matters the justices were able, however, to retain some measure of their old administrative authority. One of these is the county police, which is today controlled by a joint standing committee consisting of equal numbers of county justices and county councillors. The other matter is the issue of liquor licences. No new administrative duties have been given to borough justices since 1835, or to the county justices since 1888, save in regard to licensing matters, in which their powers were extended in recent times to cover music, dancing and cinematograph shows.<sup>1</sup>

So much, then, for some examples of the administrative functions of judges. No less abundant are the judicial functions of administrators.

#### THE JUDICIAL FUNCTIONS OF ADMINISTRATORS

Before 1908 there was no means of reviewing judicially the verdict or sentence of a criminal court. The only way of rectifying injustice was by the grant of a pardon to the convicted person. Hence, as Sir Edward Troup pointed out,<sup>2</sup> the Home Office was forced into the position of a final Court of Appeal in criminal cases, and had from time to time to review the whole of the evidence in the most difficult cases, and to arrive at a decision on the question of whether the law should take its course or the alleged offender should receive a free pardon, which in this case amounted to a declaration of his complete innocence, or to a conditional pardon, which mitigated the penalty, substituting, for instance, penal servitude for capital punishment. The Home Office possessed none of the ordinary powers of a court of law for this

administrative powers, though, he adds, 'the distinction is not yet, or likely to be, all-embracing' (Royal Commission on Local Government, 1923, Minutes of Evidence, Part I, M. 40, p. 20).

<sup>1</sup> See Public Health Act, 1890. Cf. Royal Commission on Local Government, 1923, Minutes of Evidence, Part I, Gibbon, Q. 41, p. 4, and Q. 75/77, p. 5. But these new licensing duties were not given exclusively to the justices.

purpose . . .'.<sup>5</sup> The Home Office has to a great extent been relieved of these particular functions by the establishment of the Court of Criminal Appeal; but the Secretary of State for Home Affairs still exercises many powers of a judicial nature, involving intricate questions of law and fact, ranging from the decision as to whether a man is or is not an alien, and if an alien, of what nationality,<sup>6</sup> to the commutation of the death penalty in capital offences.<sup>7</sup>

It is not only in the case of ancient offices, such as that of the Secretary of State for Home Affairs, that the administrator is called upon to act also as a judge. When, for example, the Charity Commissioners were established in the nineteenth century with the object of protecting charitable property from loss, and of fulfilling the charitable intentions of the donor, Parliament showered upon the devoted heads of the commissioners a huge number of inquisitorial, administrative and judicial powers in an undifferentiated conglomerate mass. Thus, the commissioners may inquire into the condition and management of practically every charity in the country and demand for that purpose accounts, statements and sworn answers. As administrators they may give advice and directions concerning the management of charities, their consent is required before any legal proceedings may be taken in connection with a charity, and they may sanction the compromise of claims made by or against a charitable foundation; while as judges they may make orders for the appointment and removal of trustees, the transfer or vesting of real estate and, in general, exercise

<sup>5</sup> *The Home Office*, pp. 58-59.

<sup>6</sup> *Ibid.* p. 153.

<sup>7</sup> In strict constitutional theory the prerogative of mercy resides in the person of the sovereign, and the Home Secretary can do no more than 'move' the King to commute a death sentence in a suitable case. But in practice the decision rests with the Home Secretary.

powers similar to those exercised by the courts prior to the passing of the Charitable Trusts Acts.<sup>8</sup>

Official receivers, to take another instance, are administrative officials appointed and removable by the Board of Trade. They are compelled by statute to act under the general directions of the Board, but they are also officers of the courts to which they are respectively attached.<sup>9</sup> Some of their functions are clearly judicial.

Enough can be seen, even by these few examples, to show that official titles are unreliable as a guide to the kind of function which is performed by a public authority. A man may be called a judge and yet do many administrative acts; his title may indicate that he is an administrator, on the other hand, and he may nevertheless be constantly engaged in carrying out judicial functions. Plenty of administrative acts are performed in open court by judges arrayed in scarlet and ermine and surrounded by all the pomp and circumstance which for centuries has attended the administration of justice by the King's judges. And many an obscure civil servant, sitting bespectacled in a quiet office, is engaged in activities which partake of a judicial character.

#### ADMINISTRATIVE LAW IN ENGLAND

'It is curious', said Maitland, 'that some political theorists should have seen their favourite ideal, a complete separation of administration from judicature, realised in England; in England of all places in the world, where the two have for ages been inextricably blended. The mistake comes of looking just at the surface and the showy parts of the constitution.'<sup>1</sup> That was written in

<sup>8</sup> Tudor, *Charities and Mortmain*, 4th ed., pp. 23-24. Most of the powers of the Charity Commissioners relating to educational foundations were transferred to the Ministry of Education by legislation.

<sup>9</sup> Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 70, 73, 151-157 and 161.

<sup>1</sup> F. W. Maitland, 'The Shallows and Silences of Real Life', *Collected Papers*, Vol. 1, p. 478.

1888, before the late Professor Dicey had published his celebrated treatise on the British Constitution. But despite the warning which Maitland uttered, Dicey did not look very far below the surface in regard to one of the main topics which he discussed in his book, namely, the question of whether a system of administrative law exists in England.

Until fairly recently, it was largely owing to Dicey's work that students of constitutional law and political science in England and the British Dominions became aware of the existence of the system of *droit administratif* obtaining in France. It is also entirely due to the same writer that for thirty or forty years many of those students were labouring under a complete misunderstanding of French administrative law. They also suffered from the delusion that there is no administrative law in England. 'Droit administratif', wrote Dicey, 'is not to be identified with any part of English law.'<sup>2</sup> English official law, he continued, is something quite different. The law which regulates the privileges of civil servants in England is merely the law of a class, whereas *droit administratif* is not the law of a class but a body of law which in given circumstances may affect the rights of any French citizen.

Administrative law in France comprises the whole body of law relating to public administration. The particular part of it which Dicey seized upon (and which he treated as identical with the whole) is the system whereby actions in respect of wrongful acts which a citizen alleges have been committed by a public official in the course of his duty are tried, not by the ordinary courts of law, but by special administrative courts composed of civil servants or other officials more or less closely connected with the government. That is, shortly, the peculiar system which

<sup>2</sup> *Law of the Constitution*, 9th ed., pp. 384-5.

prevails in France.<sup>3</sup> It has been evolved out of the special circumstances of French history and is a legacy of the constitutional tradition established after the Revolution by Napoleon I. The distinguishing features which Dicey noticed in this system of *droit administratif* were: first, that the rights of the State are determined by special rules not applicable to private individuals; second, that the courts of law are without jurisdiction in matters concerning the State and governmental litigation is tried by administrative courts; third, that a special protection is afforded to officials in respect of wrongful acts committed in the course of their official duties. The underlying principles which he observed were that the State is given exceptional and extensive privileges; and that a rigid distinction is maintained between administrative and other acts.<sup>4</sup>

There is, it is true, nothing similar to the French system in England; and Dicey was in a narrow sense justified in giving 'a decided and negative reply'<sup>5</sup> to the question whether *droit administratif* had been introduced into the law of England. Any official, as he pointed out, who exceeds the authority given to him by the law is liable to be sued in the ordinary courts of justice and mulcted in damages or otherwise made to redress his wrong.

But because there is no *droit administratif* in England it does not follow that we are without a system of

<sup>3</sup> There is an extensive literature on the subject of *droit administratif* in France. The following works may be referred to on the subject: Laferrière, *Traité de la juridiction administrative*; Berthélemy, *Traité élémentaire de droit administratif*; Ducrocq, *Droit administratif*; Jèze, *Principes généraux du droit administratif*; Chardon, *L'Administration de la France, les Fonctionnaires*; Duguit, *Traité de droit constitutionnel*; L'État, *les Gouvernants et les Agents*; Esmein, *Éléments de droit constitutionnel*; Hariou, *Précis de droit administratif*; Jacquelin, *La Jurisdiction administrative*; also *Les Principes généraux du droit administratif*; Dieudonné, *Manuel de droit administratif*; De Laubadère, *Manuel de Droit Administratif*; Waline, *Manuel Élémentaire de Droit Administratif*.

<sup>4</sup> *Law of the Constitution*, 9th ed., Chap. 12.

<sup>5</sup> *Op. cit.* pp. 384-5.



administrative law. In the earlier editions of his book Dicey had maintained that though in England the powers of the Crown and of civil servants might be increased from time to time, they must always be exercised in accordance with the ordinary common law which governs the relation of one Englishman to another.<sup>6</sup> In the last edition published during his lifetime,<sup>7</sup> he displayed in a long additional introduction a certain uneasiness at the argument which he had for so long adopted in the body of the work. For he remarked that during the last thirty years the extension of the duties and authority of English officials had produced in the law governing bureaucrats some of the characteristics of the hated *droit*. The law of England, he feared, was being 'officialised' under the influence of Socialistic ideas.<sup>8</sup> But, he concluded, sweeping aside all these unquiet thoughts and reverting to his original position, 'It would be a grave mistake if the recognition of the growth of official law in England . . . led any Englishman to suppose that there exists in England as yet any true administrative tribunals or any real administrative law'.<sup>9</sup>

But uneasy lies the head that writes a book on the British Constitution. The following year (1915) saw the publication of almost the last contribution which Dicey made to the subject of which he was for generations the leading exponent: it was a short article in *The Law Quarterly Review*—a mere fragment bearing the significant title 'The Development of Administrative Law in England'.<sup>1</sup> In spite of A. V. Dicey's undisputed eminence and learning, had it not been for this inconsiderable fragment in a learned periodical, demonstrating as it did a remarkable ability to abandon at the last

<sup>6</sup> *Op. cit.* p. 386.

<sup>7</sup> The 8th edition, issued in 1914.

<sup>8</sup> *Ibid.*, Introduction, xlv.

<sup>9</sup> *Loc. cit.*

<sup>1</sup> Vol. 31, p. 148.

moment the ideas of a lifetime, it would have been difficult not to feel that in old age he had lost that capacity for the careful observation of political institutions and legal phenomena which had made him the most distinguished writer on English Constitutional Law of his time.

President Lowell of Harvard, in his well-known book *The Government of England*, adopted a similar point of view to that which Dicey held. 'The Parliamentary government of England', he says, 'is . . . a government according to law and by means of law. . . . One result of this has been the absence of a body of administrative law, with peculiar principles of its own, enforced by special tribunals distinct from the ordinary courts. . . . Nor has the great increase in the nineteenth century of central control over local government brought any real approach to administrative law of the continental type. Boards with official functions, such as the Railway Commission, have, indeed, been created, but they do not stand in at all the position of administrative courts. . . .'<sup>2</sup>

The late Lord Hewart, then Lord Chief Justice of England, in addressing the American Bar Association at Buffalo in September, 1927, is reported to have said that the common law does 'not recognise any *droit administratif*. Every person, whatever position he might occupy in the State, is subject to the law of the land, and there are no special tribunals for the trial of matters in which public departments or Ministers of State are concerned'.<sup>3</sup>

Sir John Marriott, in a work which purports to describe the working of the modern State, recites the well-worn tale that a 'marked feature' of the English government is 'the acceptance in the fullest sense of the *Rule of Law*'. Summarily it may be said, 'it is by the supremacy of the law, and the "ordinary" law, that the government of

<sup>2</sup> A. Lawrence Lowell, *The Government of England*, Vol. 2, p. 480.

<sup>3</sup> *The Times*, Sept. 2, 1927, and Sept. 30, 1927.

England is most clearly differentiated from that of countries where, as in France, there exists side by side with the ordinary law a code of rules constituting the *droit administratif* . . .<sup>4</sup>

No modern student of law or political science has today the slightest doubt that there exists in England a vast body of administrative law. It comprises the law relating to public administration. English administrative law is, indeed, so extensive that the problem is not to discover it but rather to master its widespread ramifications and to reduce it to some kind of order and coherence. One branch of this law, of great importance from every point of view, is concerned with the exercise of judicial functions by bodies other than the courts of law. It is with this subject that this book is concerned.

It will become clear from the following chapters that one of the most remarkable developments in the British Constitution during the past fifty years is the appearance of a whole series of official tribunals, more or less closely connected with the administrative departments of government, possessing power to decide questions of a kind which would 'normally' have come within the jurisdiction of the formal courts of law. There is a great diversity both of structure and of function to be observed in the welter of official tribunals which I shall presently describe. Many of the matters with which they deal are of great importance, and in the large majority of cases their decisions are as conclusive and as binding as those of the formal courts of law, whose authority, indeed, has in most cases been either diminished or excluded altogether in regard to the matters in question.

The reason for this growth, or, as it might be called, this revival of administrative law in England, is not far to seek. With the extension, during the nineteenth and

<sup>4</sup> Sir J. A. R. Marriott, *The Mechanism of the Modern State*, Vol. 1, p. 163.

twentieth centuries, of the functions of government to one new field after another, with the progressive limitation of the rights of the individual in the interests of the health, safety and general welfare of the community as a whole, with the development of collective control over the conditions of employment, the manner of living, and the elementary necessities of the people, there has arisen a need for a technique of adjudication better fitted to respond to the social requirements of the time than the elaborate and costly system of decision provided by litigation in the courts of law. A demand has arisen for a new type of justice which shall be less like what Dean Roscoe Pound calls 'a system of hands off while individuals assert themselves freely' and more like 'a social institution existing for social ends'.<sup>5</sup> Whether or not the administrative tribunals which have been set up do satisfy that demand, what advantages and disadvantages they can be seen to possess, are questions which will be answered in due course. But regardless of whether their existence is desirable, there is no doubt that the revival of administrative law in England is very largely due to the creation of new types of offences against the community, the growth of a new conception of social rights, an enhanced solicitude for the common good, and a lessening of that belief in the divinity of extreme individualistic rights which was evinced in the early nineteenth century. Whatever may be the reason for its creation, however, it is impossible to say that our régime of administrative justice is not part of the law.

#### THE HEGEMONY OF THE EXECUTIVE

One important result of this development is clear beyond doubt: namely, that the administrative departments of the State have acquired an immense accession of power.

<sup>5</sup> *The Spirit of the Common Law*, p. 197.

Despite the fact that Parliament places annually upon the statute book an ever-increasing burden of legislative output, it is nevertheless true to say that the centre of gravity in English government has shifted from legislation to administration during the past half-century, and the hegemony of the executive, whether we like it or not, is an accomplished fact. The nineteenth century relied primarily upon legislation which was to a large extent 'self-operating'—that is, enforced by citizens in their private capacity; but we in the twentieth century rely primarily upon administration created by Parliament to carry out its own Acts. Since I am not concerned here with legislative functions I shall make no comment upon the wide legislative authority which has been conferred upon government departments in recent times; on the frequent power to make rules and orders which shall give content to loosely woven statutes, on the ability to fix 'appointed days' that shall bring into force or defer the operation of whole Acts of Parliament. The delegation of legislative power by Parliament to administrative agencies in general, and to the great departments of State in particular, is now one of the commonplaces of English political life.<sup>6</sup> But even confining ourselves to a survey of certain aspects of administrative and judicial functions, it will become apparent in the course of our inquiry that enormous inroads have been made by administrative departments on a province which a century ago was regarded as the jealous preserve of the judiciary.

It must not be assumed that there is anything inherently and necessarily evil in that movement. Providence has not ordained any particular method of allocating governmental powers. When Professor J. H. Morgan<sup>7</sup>

<sup>6</sup> Cf. C. T. Carr, *Delegated Legislation; Concerning English Administrative Law*; Willis, *The Parliamentary Powers of English Government Departments*.

<sup>7</sup> Introduction on 'Remedies against the Crown' to Gleeson Robinson, *Public Authorities and Legal Liability*, p. xliv.

denounces the acquisition of judicial functions by the executive as being 'all the more unwarrantable' because of the fact that the courts of law have not in their turn encroached on the functions of the executive, he writes as though the executive and the judicature were riparian owners bargaining over a strip of land or European powers carving up an African colony. Neither the executive nor the judiciary has any immutable 'right' to a particular province: it is merely a matter of expediency what powers are allocated to either of them at any particular time; and the social welfare is the only valid test of what is desirable.<sup>8</sup>

#### CONCLUSION

After a long and somewhat painful evolution we have come to regard the determination of a question by a court of law as carrying with it an assurance that the matter will be decided by means of a certain process. That process involves the application of a body of rules or principles by the technique of a particular psychological method; the whole decision taking place within a framework possessing recognisable institutional features. The body of rules or principles is the law; the psychological method consists in the application of what may be called the judicial mind; and the institutional framework is the Court system. The entire process, in which the three are used in combination, is denoted by the expression *Justice According to Law*.

A very great deal has been written and talked, during

<sup>8</sup> In contrast to Professor Morgan, it is interesting to note that Sir Claud Schuster, G.C.B., K.C., the then Permanent Secretary to the Lord Chancellor, in giving evidence before the Royal Commission on Local Government, described the judicial, police and administrative functions of the justices of the peace, and then remarked: 'No one on earth can analyse the thing and say, "such and such things they ought not to do, because they are administrative, and such and such things they ought not to do, because they are police matters", because that must depend upon the sort of general view you take of the universe. There is no eternal right in the matter' (Royal Commission on Local Government, 1923, Minutes of Evidence, Part 2, p. 428, Q. 6442-6443).

the past two thousand years, about the changing body of doctrine which we term the Law. Hardly anything has been said about that equally important element in the judicial process which may be called the Judicial Mind. Without a judicial mind to apply it, our body of law would disintegrate in a year, and society relapse into savagery. We should witness the sort of movement which is spoken of in connection with semi-civilised American Indians as 'a return to the blanket'. Of all psychological developments, perhaps none has been more important in the history of man than the gradual emergence of the 'judicial' idea, not merely in regard to questions which come before the courts of law but also in reference to a vast province covering nearly all the rational activities of the human race. Our æsthetic and moral 'judgments', our scientific theories arrived at according to 'the weight of evidence', our disapproval of an 'injudicious' speculation on the Stock Exchange, are all extensions and developments of the mental processes and conceptions which were evolved in the courts of law even if they did not originate there.

I propose in a later chapter to analyse the nature of this judicial mind; and we can then inquire whether, with the rise of administrative law in England, there has been a spreading of the judicial outlook to those administrative tribunals of which we have already spoken.

This, after all, is the vital question. ✓ For the predominant virtue of the judicature lies only in the fact that it thinks and acts judicially and is recognised as doing so: that, and that alone, is the essence of its merit, platitudinous though it may seem to say so. And accordingly, if we find that the administrative organs of justice have developed the tradition and the ability to arrive at decisions in a judicial manner, we need spill no tears of regret merely because they do not bear the institutional characteristics of the former courts of law. What society

needs is the operation of a judicial spirit far more than an insistence upon the mere outward features of a formal court; though, as we may discover, some of those outward characteristics are necessary before the judicial spirit can emerge or flourish with any guarantee of stability. Again and again in the history of civilisation, what appeared at first as an arbitrary discretion wielded by an irresponsible official, gradually crystallised into a body of known, ascertainable and consistently applied law. An outstanding example of this is the equitable jurisdiction exercised originally by the Lord Chancellor and now administered by the Courts of the Chancery Division. That originally had in it 'an arbitrary or discretionary element',<sup>9</sup> to say the least; but even before the end of the seventeenth century it was clear that equity was growing into a system of law almost as certain and recognisable as the common law itself. In other words, the judicial mind was asserting itself and accomplishing a stabilising process which can be observed at work in many countries and at many epochs. So when Sir Frederick Pollock warns us that 'there is an ever growing tendency, constitutional traditions and safeguards notwithstanding, to confer more and more discretion, often of a substantially judicial kind, on officials of the great departments of State who practically cannot be made responsible',<sup>1</sup> it may be suggested that, rather than to wring our hands over a *fait accompli*, it is more profitable to see whether these officials are displaying any signs of developing a judicial technique, and, if they are not, to endeavour to discover by what means, if any, a judicial attitude of mind may be developed.

No single change in the life of the world is needed more urgently or would bring about a greater improvement than that mankind should exhibit a more judicial

<sup>9</sup> A. V. Dicey, *Law of the Constitution* (9th ed.), p. 381.

<sup>1</sup> *The Genius of the Common Law*, p. 43.



frame of mind in certain departments of life. All our efforts at securing international peace by means of an organisation which shall prevent civilisation being once again turned into a wilderness of internecine strife; all our attempts at producing industrial agreement by some method less inevitably impoverishing than the long-protracted trade disputes which cast a blight over productive capacity; every voice which pleads for a treatment of native races more disinterested than that meted out only too often by the concession-hunter intent upon his own gain: all such efforts as these may be reduced to a single plea that men and women should act in a more judicial spirit.

What, then, we may ask, is the relation between that spirit and the judicial process which goes on in the courts of law and from which the very conception is borrowed? Is there no significance in the use of a single word for both purposes? We are inclined to go so far as to suggest, indeed, that the whole modern conception of economic and social democracy involves the exercise of discretions which shall be 'judicial' in that they are not to depend on individual caprice and shall be free from personal favour and individual self-interest; and this may imply an extension in certain respects of the judicial mind, an application of mental habits common among those who administer the judicial process.

But we are anticipating. This inquiry aims at embodying something more concrete than an investigation into habits of mind. It is primarily a study of actual institutions; or, to put it more exactly, of the social organs through which the judicial process is carried on and in which the judicial mind operates. What I propose to do is, first, to examine the institutional characteristics of purely judicial functions as compared with administrative functions; next, to describe the structure and function of Administrative Tribunals and Domestic Tribunals.

There will follow an analysis of what I have called the judicial mind; a discussion of the inquiry made by the Committee on Ministers' Powers; an examination of the attitude of the courts towards these new developments; and, finally, I shall endeavour to assess the advantages and disadvantages of the administrative tribunals already discussed, and to formulate certain conclusions of a practical nature regarding their structure and functions.

## CHAPTER 2

### JUSTICE IN THE COURTS

Popular Notions of the Judicial Process—The Independence of the Judge—The Immunity of the Judge—The Responsibility of the Administrator—The Integrity of the Judge—The Integrity of Administrators—The Judge must Act Personally—The *Lis Inter Partes*—The Right to be Heard—According to the Evidence—The Case in Hand—A Final Decision—Conclusion.

#### POPULAR NOTIONS OF THE JUDICIAL PROCESS

THE word 'judicial' is closely bound up nowadays, in the minds of most people, with the idea of a court of law. If six or seven people walking in a London street were stopped at random and asked to describe on the spur of the moment, what they understood by judicial proceedings, most of them would probably refer in one way or another to the courts of justice. One might be thinking of the latest sensational murder trial of which he had read in the morning's newspaper; another of the county court where his landlord had recently tried to evict him from his house; another (the son of an agricultural labourer) of the local bench of justices where poachers get punished; another, whose father died recently in an abnormal mental condition, of protracted litigation in the Probate Court over the will; another of a spin in a fast car, a brush with the police and a narrow escape before the local stipendiary magistrate; a sixth might have in mind a vague memory of service on a jury years ago in some forgotten libel action; a seventh the humiliating publicity likely to ensue from a petition for divorce in which he will shortly be concerned. In the minds of all of them the idea of judicial proceedings will almost certainly be inseparably connected in some way with one or more of the various courts of law of which the formal

part of the judicial system is composed. None of them (unless he is a trained lawyer) is likely to have an accurate mental picture of the entire system of judicature, with the House of Lords at the top and the county court or the courts of summary jurisdiction at the bottom, or to understand the different lines of ascent for civil and criminal cases, or to know the difference between quarter sessions and assizes, or to be conversant with exactly what sort of appeal may be brought before the Judicial Committee of the Privy Council. But this lack of detailed knowledge will not affect the general conception which leads most people to identify judicial functions with the formal courts of justice.

The *Oxford English Dictionary* bears out the man in the street in this matter. The first and most important meaning given therein to the word 'judicial' is 'of or belonging to judgment in a court of law, or to a judge in relation to this function; pertaining to the administration of justice; proper to a court of law or a legal tribunal; resulting from or fixed by a judgment in court'. Tomlin's *Law Dictionary* follows the same line of thought in defining judicial decisions, opinions, or determinations as 'the sentiments of the judges delivered in a cause in court before them, and which form the decree or judgment of the court'.<sup>1</sup>

When people identify judicial functions in this general sort of way with a court, or a hierarchy of courts, they are clearly not using the word in its original meaning. *Curia*, or court, formerly signified the king's palace<sup>2</sup> or mansion, and we still talk about the Court of St. James's, or of the Court having moved to Windsor, when we intend to refer to the king's person or entourage. In early times the royal judges sat in the king's residence, which thus came

<sup>1</sup> Cf. *Re L.G.B.* (1885), 16 L.R.Ir. 150.

<sup>2</sup> Jacob, *Law Dictionary*—*sub voce*, court; Halsbury, *Laws of England*, (Hailsham Edition), Vol. 8, p. 525.

to be identified with the administration of justice. This continued even when the actual hall or room used by the judges ceased to be connected geographically with the king's palace. Thus, Blackstone observes that 'a court is a place where justice is judicially administered'.<sup>3</sup> In the course of time the word 'court' has come to denote, not merely the hall in which the judges sit for the conduct of public business but also the actual tribunal itself, which is frequently spoken of as 'the court'.<sup>4</sup> And, as we suggested above, the idea of courts of law is now almost inseparably connected, in the popular mind, with the notion of judicial proceedings.

But the mental image which is raised by the conception of the judicial process is only remotely related to the buildings which comprise the court houses which happen to be known to a particular individual; or, at least, that is not the important part of the image. Underlying the conception of the judicial function as a process administered in a court of law is a whole series of ideas, scarcely any of which could probably be formulated coherently by our man in the street, but each one of which has a more or less definite place in the vague thoughts flitting through his mind. In this chapter an attempt will be made to describe the essential characteristics underlying the general notion of justice administered according to law in courts civil and criminal. Wherever possible we shall compare or contrast those characteristics with corresponding features of the administrative process.

#### THE INDEPENDENCE OF THE JUDGE

The establishment of impartial justice is by no means the same thing as the formation of a court of law in our

<sup>3</sup> See Stroud, *Judicial Dictionary*, Vol. 1, p. 424. See also Co.Litt. 58 (a).

<sup>4</sup> Cf. E. Jenks, *Law and Politics in the Middle Ages*, p. 134. Professor Jenks points out that questions coming to the King's court at first were offences against the King's peace, against the royal property, etc., which were decided by domestic officials, who constituted his *hof* or *palatine*, his *curia*. 'At first, this body is not a judicial body at all. . . . It is the Court of St. James's, rather than the Court at Temple Bar.'

modern sense.<sup>5</sup> But of all primitive ideas of justice, none is more fundamental than that which predicates a judge who is impartial. Impartiality involves various psychological factors, of which we shall have something to say later; but it also requires certain institutional conditions.

The first of these conditions is the independence of the judiciary. The principle of judicial independence has not always obtained in England in past times, nor does it always obtain abroad today. There is a deep historical significance in the lines of Shakspeare's *Henry the Eighth*,<sup>6</sup> where the wretched Queen Katherine passionately declares:—

Heaven is above all yet; there sits a judge  
That no king can corrupt.

But speaking generally, (we have now established a system whereby the tenure of office of the judge does not depend on the favour of the government of the day; nor, let us add, on the pleasure of great interests outside the administration.) Whether or not the decisions of a judge bring satisfaction or anger to the Prime Minister and his colleagues, or to the Lord Chancellor, he cannot be dismissed at will. His tenure is for life, or until retirement, subject only to good behaviour. His salary is fixed and paid out of the Consolidated Fund in order that it may not be subjected to that running fire of criticism in Parliament to which all the ordinary items of budgetary expenditure are liable.<sup>7</sup> His conduct cannot even be discussed in Parliament save on a substantive motion for an address for removal from office: an extreme step to be taken only in the event of impropriety of the gravest kind.<sup>8</sup>

<sup>5</sup> L. T. Hobhouse, *Morals in Evolution*, p. 115.

<sup>6</sup> Act III, scene i, line 100.

<sup>7</sup> See Robert MacGregor Dawson, *The Principle of Official Independence*, 1922, p. 12.

<sup>8</sup> Sir T. Erskine May, *Parliamentary Practice*, 14th ed., p. 374.

The judiciary is, in effect, part of the public service of the Crown. But a judge is not 'employed' in the sense that a civil servant is employed. He fills a public office, which is by no means the same thing; and part of his independence consists in the fact that (no one can give him orders as to the manner in which he is to perform his work.) Like the more fortunate practitioners in some professions, 'he owns no man master'. The only subordination which he knows in his official capacity is that which he owes to the existing body of legal doctrine enunciated by his brethren, past and present, on the bench, and the legislative enactments of the King in Parliament.

(The administrator of public services, on the other hand, is an employed person par excellence.) Not in the sense that he is liable to be hired and fired at a moment's notice, for under modern conditions the great mass of State and municipal officials have been given a security of tenure which in the vast majority of cases is (in practice though not in law) as complete as that of the judge; but in the sense that employment involves a subordination to higher authority, a liability to receive instructions as to the work to be done and the manner in which it is to be performed—a liability which pervades the entire realm of public administration.) This distinction was well brought out in a case which came before the House of Lords. A clerk of the peace, who by statute also necessarily held the position of clerk to the county council, claimed that he could not have his appointment terminated by notice in the ordinary way, despite the fact that his contract of employment as clerk to the county council expressly provided that six months' notice on either side should terminate the appointment. The House of Lords unanimously decided that a clerk of the peace is irremovable except for misconduct, and that the

appointment is, therefore, virtually a freehold for life.<sup>9</sup> The decision really turned on the question whether the clerk of the peace was the holder of an office of a judicial nature under the Crown or an official employed by the local authority. According to Lord Buckmaster, the fundamental fallacy underlying the county council's case lay 'in the view that the joint committee (of the county council and the justices of the peace for the county) contracted for the service of an officer instead of merely exercising the powers of appointment to an office. The respondent was not engaged as their servant; he was clerk of the peace in the service of no one except the Crown'. In other words, the clerk of the peace enjoys what may broadly be regarded as a judicial tenure of office, and does not occupy the 'employed' position of an administrator.

This distinction as to tenure is not, it may be contended, a fundamental one. It merely happens that at a particular time it is customary in England to appoint judicial authorities in one way and administrative officials in another; and it is quite possible to imagine large alterations in these arrangements without any far-reaching changes being produced in the manner in which administrative and judicial functions are exercised, or in the real grounds of their differentiation. Thus, for example, judges might be appointed for a set term of years—a decade, let us say—and administrative officials might have a contract for life subject only to good behaviour; and no immediate change might be perceptible in the method of carrying out their duties. The only real bearing which the matter has on our discussion is the effect that tenure of office has on the mental processes which are

<sup>9</sup> *Lord Leconfield v. Thornely*, [1926] A.C. 10. The position of clerk of the peace and clerk of a county council is now governed by the Local Government (Clerks) Act, 1931, ss. 1, 2 and 4 and the Local Government Act, 1933, ss. 98-100. The former statute was passed in consequence of the decision in the above case. See W. E. and W. O. Hart. *An Introduction to the Law of Local Government and Administration* (2nd ed., 1946), pp. 50-52.



involved in the making of a decision. In so far as the ultimate possibility of dismissal induces the administrator to take into consideration the will of his superiors in deciding a question,<sup>1</sup> it is important; just as the relative security of tenure of the judiciary is important in so far as it enables the judge to adopt a particular attitude of mind towards the problem before him and to decide the case without fear of the consequences; regardless, that is to say, of whether the decision does or does not please some other person or persons. (The administrator continues to fulfil his functions only so long as his activities in general please, or, at any rate, do not actively displease, someone in authority above him.) (This is not the case with the holder of a judicial office, who can displease an indefinite number of persons an indefinite number of times without any personal consequences ensuing to himself, providing only that he remains sane and does not commit one of those enormities which constitute misconduct.)

Thus, in so far as it produces psychological effects in regard to the making of decisions, it is clear that the independence of the judge from control in his official duties does have definite results. (A judge may give an unlimited number of decisions which are wrong in law and based on incorrect findings of fact, without incurring a penalty; and the continual reversal of his judgments by the higher courts will not produce consequences affecting him personally, at any rate in England, where promotion and demotion scarcely exist on the bench, save to the most limited extent. But this is not the case with the administrator. (An incorrect or even an unwise decision, though supported by his superiors in public, may lead

<sup>1</sup> The Royal Sanitary Commission of 1871 observed that 'In order that Medical Officers of Health may be able to discharge their duties without fear of personal loss, they shall not be removed from office by any local authority except with the sanction of the central authority' (Second Report, p. 35).

behind the scenes to an absence of promotion, less responsible work, or even to dismissal from office in a serious instance. In the case of judicial functions it is invariably the subject-matter of the decision—that is, the judgment and the reasoning underlying it—which is alone liable to criticism and reversal. In the case of administrative functions it is rather the ability and judgment of the administrator himself which are looked at askance when mistakes are made, and his personal career is liable to suffer in consequence of those mistakes. Furthermore, the judge takes no orders, in the ordinary sense of the term.)

(The security of tenure which the judge enjoys is at bottom the most essential fact underlying the principle of independence.) It results in a recognition by the general public that the judge has nothing to lose by doing what is right and nothing to gain by doing what is wrong.<sup>2</sup> It is founded on the belief that a man cannot be relied upon to act rightly regardless of the personal consequences.

(The independence of the judiciary lends prestige to the office of judge and inspires confidence in the general public.) It acts as a safeguard, not merely against the manipulation of the law for political purposes at the behest of the government in power, but also against the corruption of the judicial organs of the State by the bribery and intimidation of powerful outside interests which threaten the impartial administration of justice from time to time.

‘The psychological fact behind the principle of independence’, wrote Graham Wallas,<sup>3</sup> ‘is not the immediate reaction of feeling in a man whose impulses are obstructed, but the permanent result in his conduct of the obstruction of some impulses and the encouragement

<sup>2</sup> R. MacGregor Dawson, *The Principle of Official Independence*.

<sup>3</sup> *Our Social Heritage*, p. 188.

of others. We make a judge "independent", not in order to spare him personal humiliation, but in order that certain motives shall not, and certain other motives shall, direct his official conduct.' The existence of this psychological fact might be proved by many examples, past and present. We may take as a single instance the conflict which took place a century ago in New South Wales between Governor MacQuarie and Ellis Bent, the judge advocate and first judge of the Supreme Court of the Colony, concerning the independence of the latter. Friction arose between the two over such questions as whether emancipated convicts should be permitted to practise in the local courts; and it was inflamed by the governor sending a draft of some proposed port regulations to the judge for revision and correction after the latter had declared that in his opinion they were illegal.<sup>4</sup> Bent found the position of subordination to the governor which MacQuarie expected him to accept intolerable, and he addressed a request to the Home Department that he should be accorded 'that independence of the Colonial Government which . . . is so essential to the upright execution of my office'.<sup>5</sup>

The independence of the judge is, we may conclude, of essential importance in so far as it enables the judge to adopt a particular attitude of mind towards the questions which come before him for decision. He can, in short, determine the case before him without fear that adverse results or material reward will accrue to him according to whether the decision does or does not meet with the approval of other persons.

#### THE IMMUNITY OF THE JUDGE

Not only is the judge given an almost complete independence in the tenure and conduct of his office, but certain

<sup>4</sup> Marion Phillips, *A Colonial Autocracy*, pp. 210-220.

<sup>5</sup> *Ibid.* p. 211.

immunities of an important character are extended to him in his official capacity. The most notable of these is an immunity from legal responsibility in respect of his judicial functions. 'It is a principle of our law', said Mr. Justice Crompton in 1863, 'that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly.'<sup>6</sup> Kay, L.J., in subsequently reasserting the principle, widened the rule to include apparently any judge, and extended the immunity even to acts done 'for the purpose of gratifying private spleen'.<sup>7</sup> The rule has been held to apply to justices of the peace sitting to try criminal cases,<sup>8</sup> and to naval and military courts-martial. And even an arbitrator is immune from an action for lack of skill or negligence in making his award,<sup>9</sup> provided he complies with certain elementary conditions.

There are no limits to the immunity enjoyed by a judge when acting in his official capacity: the protection is absolute and unqualified. He may insult the jury, as in the case of one Skinner, a justice of the town of Poole, who in 1772 was indicted for scandalous words spoken by him in general sessions of the county, when he said to the grand jury: 'You have not done your duty; you have disobeyed my commands; you are a seditious, scandalous, corrupt and perjured jury'—and no indictment will lie.<sup>1</sup> He may even imprison the jury for non-payment of a fine imposed by giving a verdict against his own direction: and still no action will lie against him.<sup>2</sup> Furthermore, the immunity from legal responsibility extends, not merely to the judge personally, but to all the persons before the court, such as the parties to the litigation, their witnesses,

<sup>6</sup> *Fray v. Blackburn* (1863), 3 B. & S. 576, at p. 578.

<sup>7</sup> *Anderson v. Gorrie*, [1895] 1 Q.B. 664 at p. 672; *Scott v. Stansfield* (1868), L.R.Ex. 220.

<sup>8</sup> *Royal Aquarium v. Parkinson*, [1892] 1 Q.B.D. 431.

<sup>9</sup> Russell, *Arbitration and Awards*, 13th ed., p. 176.

<sup>1</sup> *R. v. Skinner*, 100tt's Reports, p. 55, Lord Mansfield.

<sup>2</sup> *Hammond v. Howell* (1678), 2 Mod., p. 218.

counsel and solicitors;<sup>3</sup> and it includes ancillary officials such as an official receiver.<sup>4</sup>

This immunity of the judge is a comparatively modern development, and did not exist in early times. Formerly, indeed, the procedure by means of which the decision of a court was questioned actually took the form of a complaint against the judge personally. The modern rules originated somewhat mysteriously in the sanctity of the record of a court of record; but they were stressed and strengthened by the desire of the judges to be free from the interference of rival courts, such as the Star Chamber.<sup>5</sup> It was not until the beginning of the seventeenth century that Lord Chief Justice Coke for the first time interpreted the immunity of the judge in terms of public policy. The judges, he said, are to make an account to God and the King only; for otherwise 'those who are the most sincere would not be free from continual calumniations'.<sup>6</sup> In a modern case the judge explained that the absolute privilege attaching to the statements and actions of judges, advocates, witnesses and others is not a privilege to be malicious, but a privilege to have judicial proceedings exempt from all inquiry whether malice or other wrongful element were present or not. 'The real doctrine of what is called "absolute privilege"', said Channell, J., 'is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not . . . the reason being that [judges, advocates and litigants] should be perfectly free and independent.'<sup>7</sup>

This protective mantle thrown over the judge's shoulders is a garment that was woven by the common

<sup>3</sup> *R. v. Skinner*, *supra*, Lord Mansfield.

<sup>4</sup> *Bottomley v. Brougham*, [1908] 1 K.B. 585; *Burr v. Smith*, [1909] 2 K.B. 306.

<sup>5</sup> W. S. Holdsworth, 'Immunity for Judicial Acts', *Journal of the Society of Public Teachers of Law*, 1924, p. 17.

<sup>6</sup> *Floyd v. Barker* (1608), 12 Co.Rep. 24.

<sup>7</sup> *Bottomley v. Brougham*, [1908] 1 K.B. 584.

law, though the fabric has from time to time been strengthened by Acts of Parliament.<sup>8</sup> Only one chink is still left in the armour: to wit, the requirement that the judge must necessarily be acting within his jurisdiction. The immunity of the judge prevails only so long as he keeps strictly within the metes and bounds of his authorised domain; so soon as he ventures outside them, or commits acts of an extra-judicial character or alien to his judicial duty, immediately he becomes exposed to the chill winds of legal liability.<sup>9</sup> Absence of jurisdiction may arise for many different reasons; but whatever the cause, where there is no jurisdiction, there the immunity fades away more quickly than the setting sun. In Professor Holdsworth's view, the fact that for three centuries—from the sixteenth to the nineteenth—most of the local government of the country was administered by justices of the peace, made it essential to draw a distinction between judicial acts done within jurisdiction and administrative acts of a non-judicial character, if an intolerable tyranny was to be averted; and the distinction is clearly maintained on those lines in certain statutes which aim at protecting the justice of the peace.<sup>1</sup>

Be that as it may, there is no doubt but that the immunity of the judge is one of the typical characteristics of the administration of justice in England; and the tendency of the courts is to extend the protection of at least a qualified immunity to all persons who are called upon to perform functions of a judicial character, regardless of their official title and nominal position.<sup>2</sup>

<sup>8</sup> See, for example, 11 & 12 Vict. c. 44 (1848), 'An Act to Protect Justices of the Peace from vexatious actions for Acts done by them in execution of their office'.

<sup>9</sup> Halsbury, *Laws of England* (Hailsham Edition), Vol. 28, p. 275.

<sup>1</sup> W. S. Holdsworth, 'Immunity for Judicial Acts', *Journal of the Society for Public Teachers of Law*; cf. 11 & 12 Vict. c. 44.

<sup>2</sup> *Everett v. Griffiths*, [1921] 1 A.C. 631; but compare *Local Government Board v. Arlidge*, [1915] A.C. 129; *Board of Education v. Rice*, [1911] A.C. 179.

But protection from legal liability is not the only sort of immunity which may be offered to a judge worthy of his position. There are certain extra-legal immunities which are of great importance in strengthening the position occupied by the judicature in the public estimation. One of these is the freedom from Parliamentary criticism normally enjoyed by judges. The Speaker will rule out of order any attack on the conduct of a judge unless it takes the form of a substantive motion such as an address for removal from office<sup>3</sup>—an extreme step which is only resorted to in cases of serious impropriety. No question may be asked in Parliament, again, if it reflects on the character or conduct of a judge or makes direct or implied charges of a personal character;<sup>4</sup> and no reflections may be cast on the conduct of judges in debate, except in a discussion based on a substantive motion.<sup>5</sup> The judge shares, in fact, the same degree of immunity from Parliamentary criticism as that accorded to the King, the Viceroy of India, the Speaker and other highly-privileged personages; and in practice he enjoys an almost complete protection from attack by members of the Legislature.

Even more important is the immunity enjoyed by the English judicature from attacks by the press. Certain forms of scandalous abuse or defamation of a judge by a newspaper amount to contempt of court and are punishable as such by fine or imprisonment by the court itself. But serious criticism in the press is another matter altogether and is in law permissible, provided it is not made in respect of a case sub judice. But in practice it rarely takes place, and in effect the judiciary enjoys an almost complete immunity from attack either in the press or on the platform.

<sup>3</sup> Sir T. Erskine May, *Parliamentary Practice*, 13th ed., p. 271; cf. Robert MacGregor Dawson, *Principle of Official Independence*, 1922, p. 46.

<sup>4</sup> Erskine May, 14th ed., p. 374.

<sup>5</sup> *Ibid.* p. 324.

THE RESPONSIBILITY OF THE ADMINISTRATOR

With the complete immunity from legal liability enjoyed by the judge we may compare the responsibility before the law of the administrator in respect of acts committed in his official capacity. We are not concerned here with the large subject of the new liability of the Crown to be sued in actions for tort arising from the Crown Proceedings Act, nor with the special protection afforded to public bodies by such statutes as the Limitation Act, 1939, but rather with the liability attaching at common law to a particular official for his individual acts.

Broadly speaking, any official who exceeds the authority given him by the law incurs a personal responsibility at common law for his act, and is amenable to the authority of the ordinary courts of justice.<sup>6</sup> That principle is one of the foundations of administration according to law.

'The business of administration', says M. Duguit, 'is the management of the business of the State in conformity with the law.'<sup>7</sup> But the government of a State need not necessarily be carried on in accordance with settled rules and principles of any kind. Administration according to law is possible only when there are organs to impose law on the executive and courts of law to apply it; and even then it does not always exist. There has been in the past, and there still is in many countries, administration without law. And such administration is not even necessarily inefficient.<sup>8</sup> But it affords no protection to the individual, and the liberty of the subject is at the mercy of the governing power of the day.

Administration according to law is, indeed, a comparatively late development in history. It made its first

<sup>6</sup> A. V. Dicey, *Law of the Constitution*, 9th ed., p. 380.

<sup>7</sup> L. Duguit, *Law in the Modern State*, Eng. tr., p. 158.

<sup>8</sup> See Nagendranath Ghose, *Comparative Administrative Law*, 1917, Calcutta, particularly the excellent first chapter, which is most suggestive.



appearance in an embryonic form in England under the Angevin kings, but it did not take definite shape until after the Revolution of 1688, when the conception of government according to law had been placed on a firm theoretical basis by Locke in his treatises on government. The establishment in practice of administration according to law was in the same century developed by the rise of the justice of the peace as an executive and judicial authority. 'Whatever the justice has had to do', writes Maitland,<sup>9</sup> 'has soon become the exercise of a jurisdiction; whether he was refusing a licence or sentencing a thief, this was an exercise of jurisdiction, an application of the law to a particular case.' The inextricable mingling of legislative, judicial and administrative functions in the single person of the justice resulted in a limiting and defining jurisdiction being extended to his administrative functions no less than to his other activities, and any overstepping of the limits thus laid down involved a legal liability.

This responsibility before the law was of a two-fold nature. In the first place, the act itself, whatever it may have been, was subject to review, and liable to be set aside by the court. In the second place, the administrator was himself liable for damages if his executive exuberance resulted in wrongdoing to another person. We shall have more to say later regarding the review by the courts of administrative determinations; all we are concerned with here is the fact that the complete immunity from personal liability which is enjoyed by the judge is not extended to the administrator, although the latter may sometimes occupy a more privileged position than that possessed by a private citizen. Thus, a county councillor who makes a defamatory statement at a meeting of the London County Council regarding an applicant for a music and

<sup>9</sup> F. W. Maitland, 'The Shallows and Silences of Real Life', *Collected Papers*, Vol. 1, p. 478.

dancing licence is held to be entitled to no greater protection than that which applies to any communication made without malice on a privileged occasion; and he is liable for slander when it is shown that through an indirect motive he recklessly states what he does not know to be true.<sup>1</sup>

Generally speaking, an action will lie against any individual who is charged with the performance of a public duty of an administrative character, either for breach of the duty or for negligence or malice in the fulfilment of it, if brought at the suit of an interested person who has suffered injury thereby.<sup>2</sup> The presiding officer at an election, for example, has two duties of an administrative nature imposed on him by the Ballot Act, 1872: namely, to deliver to the voter a ballot paper bearing the official mark, and to be present during the election at the polling station so that voters may show him the mark on the paper before dropping it in the box. For breach of either of these duties an action will lie against the officer by a person aggrieved, such as a candidate who has lost an election because votes given him were void for lack of the mark.<sup>3</sup>

This liability of the administrator for the neglect or misuse of his authority is a safeguard of considerable importance to the citizen whose personal liberty or property is interfered with in the public interest. It may be socially advantageous that such interference should take place; but it is also desirable that the person entrusted with the business of interfering should have some

<sup>1</sup> *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B.D. 431.

<sup>2</sup> For limitations to this principle, see Gleeson Robinson, *Public Authorities and Legal Liability*. The duty must be owed to the individual who is injured by the breach of it, and not to the public, for an action to lie for non-fulfilment. *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex.D. 441.

<sup>3</sup> *Pickering v. James* (1873), L.R. 8 C.P. 489, at p. 503; *Prichard v. Mayor of Bangor* (1888), 13 A.C. 241, at p. 253. Cf. *Ashby v. White* (1703), 2 Ld. Raymond 938; 3 Ld. Raymond 323; *Tozer v. Child* (1857), 7 E. & B. 377; Halsbury, *Laws of England* (Hailsham Edition), Vol. 12, p. 292.

personal responsibility in the matter. Incidentally, this makes the differentiation of judicial and administrative functions a matter of more than academic interest.

#### THE INTEGRITY OF THE JUDGE

In return, as it were, for his independence and immunity, the judge is required to observe certain conditions in the performance of his official functions. The first of these is that he shall not have any interest in the subject-matter of the litigation coming before him. The most obvious kind of personal concern which is prohibited is a financial interest, direct or indirect, in the matter to be determined. 'There is no doubt', said Mr. Justice Blackburn in one case, 'that any direct pecuniary interest, however small, does disqualify a person from acting as a judge in the matter.'<sup>4</sup> So strict is this rule that it has been held to apply in some cases even to a past interest.<sup>5</sup>

For the most part, this obligation to be free from financial interest is an unwritten condition imposed by the common law. But occasionally it has been reasserted on the statute book. Thus, for example, the Income Tax Act, 1918, specifically prohibits commissioners of income tax (who are judicial commissioners) from taking part in the determination of their own cases.<sup>6</sup>

Financial interest is, however, by no means the only form of interest from which a person performing a judicial act must be free. The judicial oath requires the judge to swear that he will 'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or illwill'.<sup>7</sup> It is obvious that certain

<sup>4</sup> *The Queen v. Rand* (1866), L.R. 1 Q.B. 230. See also Short and Mellor, *Practice of the Crown Office*, 2nd ed., p. 44.

<sup>5</sup> *R. v. Hain*, 12 T.L.R. 323, where licensing justices who had sold their shares and resigned their directorships in a company seeking a licence were disqualified because 'it could not be said that the granting of the licence was an unbiased judicial decision'.

<sup>6</sup> See s. 74 of the Act.

<sup>7</sup> Promissory Oaths Act, 1868.

kinds of relationships might exist between the judge and the parties to a dispute which would make it at least doubtful whether he would arrive at a decision without favour or affection. Kinship would nowadays certainly be regarded as a form of interest in the proceedings from which a judge should be free. Even close friendship might in certain events amount to an improper 'interest' in the proceedings. Any 'tendency in favour of either party' is, in short, sufficient to disqualify the judge,<sup>8</sup> provided that it is of a tangible and substantial nature.

But substantial it must be. Circumstances from which a mere suspicion of favour may arise do not produce the same invalidating effect on the proceedings as a pecuniary interest—though why the love of money should be regarded as a more corrupting force than other more human emotions it is difficult to say, save that a financial interest is easier to trace than an interest arising out of affection or dislike. At any rate, we find it laid down that intimacy between a juror and one of the parties is not sufficient ground for setting aside a verdict<sup>9</sup>; and in one case which has not been overruled kinship by marriage between the judge and one of the parties to a suit was held not to be sufficient to disqualify the former. For, said the Court of Exchequer, 'Favour shall not be presumed in a judge'.<sup>1</sup> That occurred in the seventeenth century, a time when purity in public life was not greatly emphasised, and a different result might be expected in similar circumstances today. But nevertheless the rule holds that 'a challenge to the favour', whether in the form of an alleged bias through kinship, friendship or enmity with one or both of the parties, is not regarded

<sup>8</sup> *R. v. Justices of Sunderland*, [1901] 2 K.B. 357.

<sup>9</sup> *Onions v. Naish* (1819), 7 Price 203; *Ramade v. Ryan* (1832), 9 Bing. 333; Halsbury, *Laws of England* (Hailsham Edition), Vol. 19, p. 312.

<sup>1</sup> *Brookes v. Earl of Rivers*, Hardres Rep. of Exchequer Cases, p. 503; Mich. 20 Carl II.

with such prohibitive strictness as is a financial interest, however small, in the subject-matter of the proceedings.<sup>2</sup>

Underlying this condition that the judge must be free from certain obvious and crude forms of interest in the case which he is called upon to decide, is the fundamental principle that a man cannot be judge in his own cause. Nor can he be both accuser and judge. 'If there is on a tribunal anyone who is an accuser, and who, although he is accuser, acts also as judge', said Charles, J.,<sup>3</sup> 'his presence on that tribunal is fatal to its jurisdiction.' It is of no importance that had he been absent the decision would have been the same. His mere presence vitiates the decision. 'The object of the rule', the late Lord Atkin more recently remarked, 'is not merely that the scales be held even; it is also that they may not appear to be inclined.'<sup>4</sup> This is one of the most deeply rooted ideas in all systems of justice. So essential is it to English legal notions that it has been suggested that not even an Act of Parliament could make a man judge in his own cause and that a statute would be void if it attempted to do so.<sup>5</sup> Whether that is or is not sound constitutional law is not likely to be put to the test. In modern times the tendency has been rather in the other direction; and there are several recent measures on the statute book in which Parliament has applied the common law rule to whole departments of State. For example, where a local authority proposed to acquire land compulsorily for housing purposes, and the taking of it was resisted by the owner, the Minister of Health was required by statute to appoint 'an impartial person, not in the employment of any government department' to inquire whether the land was suitable and whether it could be acquired without

<sup>2</sup> *R. v. Rand* (1866), 11 R. 1 Q.B. 230.

<sup>3</sup> *R. v. L.C.C., Re The Empire Theatre* (1894), 71 L.T. 698.

<sup>4</sup> *R. v. Bath Compensation Authority* (1925), 23 L.G.R. 405, at p. 428.

<sup>5</sup> *City of London v. Wood*, 12 Mod., Holt, C.J., at p. 687; *Day v. Savadge*, Hob. 87; but cf. *Lee v. Bude and Torrington Ry.* (1871), L.R. 6 C.P. 582; F. Pollock, *First Book of Jurisprudence*, pp. 268-269.

undue detriment to the owners and adjoining landowners.<sup>6</sup> Again, where panels of assessors are required for investigations under the Merchant Shipping Acts, it is the Home Secretary who selects the men, and it is he also who recommends for appointment two of the Railway and Canal Commissioners, because it was thought that the Minister of Transport, who in the ordinary course of events deals with merchant shipping and railroad transport, might in such inquiries be regarded as an 'interested party', and should therefore have no hand in the appointment of the adjudicating tribunal.<sup>7</sup>

The common law rule has been carried to great lengths. A leading case occurred in connection with the issuing of music and dancing licences by the London County Council, which delegated to one of its committees the business of hearing applications for licences. This committee recommended by a majority that a certain licence should not be granted, and the applicant thereupon applied direct to the county council itself. At the hearing, some of the members of the committee who had voted against the granting of the licence instructed counsel to oppose the application on their behalf before the full council. The councillors concerned were present at the hearing; and although they did not vote, they did not 'leave the bench'. It was held later by the courts that their mere presence vitiated the whole proceedings.<sup>8</sup> In our judgment, said A. L. Smith, L.J., the London County Council are adjudicating as to whether a man is or is not to be deprived of his licence; and, though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded.

<sup>6</sup> Housing, Town Planning, etc., Act, 1909, Schedule I. This Act has been repealed.

<sup>7</sup> Sir E. Troup, *The Home Office*, p. 92.

<sup>8</sup> *The Queen v. L.C.C., Ex p. Akkersdyk*, [1892] 1 Q.B. 190, 195. See also *Frome United Breweries v. Bath Justices*, [1926] A.C. 586; *R. v. Lancashire Justices* (1906), 94 L.T. 481. But see *R. v. Sheffield Confirming Authority*, 36 L.G.R. 38, for the limits of the doctrine of 'legal bias'.

‘When so acting, they are not emancipated from the ordinary principles upon which justice is administered in this kingdom, and which are . . . founded on its very essence.’

In an older case, the Queen’s Bench objected to the clerk to the justices acting as solicitor for one of the parties who appeared on a prosecution before his own bench.<sup>9</sup> In another case, a solicitor engaged in private practice also acted as clerk to the justices. A woman client consulted his firm at a branch office, where a managing clerk conducted the business concerning the preparation of a deed of separation. The solicitor himself took no part in the matter, but he acted as clerk to the bench when they made an order in her favour. The order was quashed on the ground that the decision of the justices might have been influenced by their clerk. The court took the view that the question was not whether the clerk was in fact biased, but whether there might appear to be a reasonable likelihood of his prejudicing the issue.<sup>1</sup> ‘The risk that a respondent may influence the court is so abhorrent to English notions of justice’, said Lord Justice Scott in a recent case, ‘that the possibility of it or even the appearance of such a possibility is sufficient to deprive the decision of all judicial force, and to render it a nullity.’<sup>2</sup> This is obviously a highly elaborated refinement of the rule that no man can be both judge and advocate in the same case.

The difficulties which arise in certain circumstances when this principle is abrogated are described by Mr. Gerrard C. Henderson in his extremely interesting account of the working of the Federal Trade Commission in the United States. The Federal Trade Commission is an administrative tribunal set up to deal with certain types

<sup>9</sup> *R. v. Brakenridge* (1881), 48 J.P. 293.

<sup>1</sup> *R. v. Essex Justices, Ex p. Perkins*, [1927] 2 K.B. 475. See also *R. v. Sussex Justices, Ex p. McCarthy*, [1924] 1 K.B. 256.

<sup>2</sup> *Cooper v. Wilson*, [1937] 2 K.B. 314.

of economic activity of an anti-social character, such as deceptive and dishonest dealings or practices in restraint of trade. The commission is an important body employing a large staff of officials. The first step takes the form of a complaint against the business man or corporation who is accused of the prohibited practices. This is issued on the report of a member of the examining division of the legal department of the commission. If this report is approved by the chief examiner, and subsequently by the commissioners themselves, the latter appoint, on the recommendation of the former, an examiner from his department to conduct the hearing. In this way the rule that a man cannot be at once an advocate and judge is set aside; and as a result great difficulty has been experienced in maintaining an atmosphere of judicial impartiality. 'The commission', observes Mr. Henderson, 'has not been able to overcome the handicap of a procedure which makes it both complainant and judge, and to impress upon its findings that stamp of impartiality and disinterested justice which alone can give them weight and authority.'<sup>3</sup>

#### THE INTEGRITY OF ADMINISTRATORS

But it is not only the holders of judicial offices who are required to be free from the sort of bias which is presumed to arise when a man has a personal interest in the subject-matter of a case that he is called upon to decide or otherwise deal with. 'Even administrators', the late Lord Atkin remarked in a modern case, 'have to comport themselves within the bounds of decency',<sup>4</sup> and quite apart from statutes it is at common law a misdemeanour for a public officer, whether judicial or administrative, to accept a bribe as an inducement to show favour.<sup>5</sup>

<sup>3</sup> Gerrard C. Henderson, *The Federal Trade Commission*, pp. 83, 84 and 327-329.

<sup>4</sup> *R. v. Bath Compensation Authority* (1923), 23 L.G.R. 405, at p. 419.

<sup>5</sup> Lumley, *Public Health*, 11th ed., Vol. 1, p. 4796; *R. v. Whitaker*, [1914] 3 W.B. 1673.



The question of the extent to which a person engaged in public administration is required to be free from the various forms of bias which are sufficient to disqualify a judge has not been fully thought out. The exercise of licensing functions is simple enough, because licensing is recognised by the courts as a judicial or quasi-judicial function, no matter by whom it is performed. Licensing justices are required to 'act honestly'<sup>6</sup> when performing administrative duties; though what amounts to honesty in this connection has not been defined. In one case a borough council which had purchased an expensive licensed hotel for the purpose of a street improvement scheme made an agreement with a brewery company that the latter should pay money to the borough council in the event of licences being granted for certain of their premises, the corporation in return agreeing to close the hotel and not to make application for the renewal of the licence in respect of it. Some of the town councillors who had taken part in these negotiations were also justices of the borough, and in that capacity granted an application made by the brewery company. They also sat as members of the confirming authority. The court held that there was a likelihood of bias, and granted a writ of certiorari.<sup>7</sup> On the other hand, it has been definitely laid down by a former Master of the Rolls that the standard of bias to be applied in licensing questions must be one which 'admits the right of justices of the peace to be at one and the same time objectors and judges'.<sup>8</sup>

The courts have shown in recent decades a tendency to apply to administrative authorities the principles designed to eliminate the possibility of bias which are applicable to judicial tribunals. A surveyor of taxes,

<sup>6</sup> *Leeds Corporation v. Ryder*, [1907] A.C. 420.

<sup>7</sup> *R. v. Sutherland Justices*, [1901] 2 K.B. 357.

<sup>8</sup> *R. v. Howard*, [1902] 2 K.B. 363; Collins, M.R., at p. 376.

for example, has no right to be present when the Commissioners for Income Tax are considering their decision in an appeal against his determination.<sup>0</sup> Nor may the county valuation officer be present with the assessment committee of an area within his county when they are considering their decision on a proposal made by an occupier of premises to amend the valuation list in respect of those premises. The fact that he remains silent during their discussion is immaterial.<sup>1</sup> An assessment committee is held by the courts to be a body exercising judicial or quasi-judicial functions, and hence the general principles affecting the possibility of bias, apply to their proceedings. Where an officer of the rating authority, whose duties included taking minutes of the rating committee's meetings, acted as clerk to the assessment committee for the area, he was held to be disqualified on the ground that he would import 'legal bias'.<sup>2</sup> The presence of the chief constable at a meeting of a borough watch committee when they were deliberating whether they would or would not confirm his dismissal of a police constable, was held to be contrary to natural justice. It therefore invalidated the committee's decision.<sup>3</sup>

The particular activities in question of these administrative bodies all had a clear judicial element in them. This was not so in *R. v. Hendon Rural District Council, ex p. Chorley*.<sup>4</sup> In that case a draft town planning scheme was awaiting departmental approval. In the meantime the Minister had made an interim Development Order under which persons desiring to build might apply to the local authority for permission to do so, thereby safeguarding their right to compensation at a subsequent stage in certain events. A councillor of the Hendon Rural

<sup>0</sup> *R. v. Brixton Income Tax Commissioners* (1913), 29 T.I.R. 712.

<sup>1</sup> *R. v. Assessment Committee (N.E. Surrey), Ex p. F. W. Woolworth & Co.*, [1933] 1 K.B. 766.

<sup>2</sup> *R. v. Salford Assessment Committee, Ex p. Ogden*, [1937] 2 K.B. 1.

<sup>3</sup> *Cooper v. Wilson*, [1937] 2 K.B. 323-4.

<sup>4</sup> [1933] 2 K.B. 696.

District Council was interested in a particular piece of land in respect of which an application to develop had been made. He voted on the resolution to grant the application. He was held to be disqualified from doing so by reason of his interest in the subject-matter under consideration and the court quashed the council's decision.

It can be inferred from these and similar cases that the law requires public officers, whether elected or appointed, and also salaried officials, when performing administrative acts, to be free from the more obvious causes of bias to the same extent as the holders of judicial office. These causes of bias include not only a direct personal interest, whether financial or otherwise, in the subject-matter under consideration or in the administrative act, but also an official or public interest in the result.

The committee on ministers' powers, Sir Cecil Carr points out, 'has discovered a new kind of bias, namely, the interest that an enthusiastic minister might have in his official work, where his department might be approaching a decision with a desire that it should go one way rather than the other. You may think that this is setting the minister an exacting standard; he has a duty to promote some public service, such as housing or health or transport, and yet at the critical moment he must hold himself back. Is not the departmental interest also the public interest?'<sup>5</sup> We shall have occasion later to notice some of the problems which have arisen from the courts applying the same rules to 'official' bias as they are wont to do in regard to personal bias of a purely self-regarding kind.

Some of the judicial decisions in this branch of law are impossible to reconcile with any rational view of the administrative process; but the general effect of the tendency to broaden the field in which the principles for the avoidance of bias and prejudice are applicable has

<sup>5</sup> C. T. Carr, *Concerning English Administrative Law*, p. 121.

undoubtedly been of public benefit. These principles have been one of the forces upholding the integrity of the judiciary. They should be equally valuable in helping to maintain the integrity of the executive. At the same time it is easy to exaggerate their importance. Mental bias based on emotional reactions, intellectual prejudices and a narrow outlook is a far more serious obstacle to impartial justice and honest administration than the crude and more easily recognisable forms of 'legal bias' which serve in law to invalidate proceedings or to disqualify a person from taking part in them. These more subtle forms of bias are, of course, entirely outside the scope of the legal doctrines which we have been considering.

In many Acts of Parliament, no less than in those parts of the law which have been formulated under the influence of successive generations of common law and Chancery judges, there can be found various safeguards intended to prevent individuals entrusted with administrative duties from being subject to personal bias arising from financial interest. Thus, the elected members of local authorities are disqualified from acting, and are liable to a heavy fine, if they are financially concerned in various ways in contracts made by the local council<sup>6</sup>; and the law goes so far as to require that even trustees, the directors of limited companies and other persons whose duties are often of a private nature, but in whose honesty the public has a concern, shall not be permitted to occupy positions in which a conflict between interest and duty is obviously likely to arise.

On the other hand, Parliament has sometimes expressly authorised an administrative authority to act as judge in its own cause. For example, under the Restriction of Ribbon Development Act, 1935,<sup>7</sup> the consent of the highway authority has to be obtained in regard to such

<sup>6</sup> Local Government Act, 1933, s. 76.

<sup>7</sup> Section 1, 2 and 7.

matters as the construction, formation or laying out of means of access to roads for which specified standard widths have been adopted; the erection of any building or a permanent excavation; the construction, formation or laying out of underground sewers, drains, electric cables and other works. The statute gives an applicant who is aggrieved by a decision of the highway authority in withholding its consent or imposing conditions a right of appeal to the Minister of Transport, who, after consulting the minister in charge of any other government department concerned, may make such order as he thinks fit and his decision is final. The very next year the Trunk Roads Act, 1936, transferred to the Ministry of Transport a number of the principal roads in Great Britain and made the Minister the highway authority in respect of them.<sup>a</sup> He thus came to possess the power of initially determining applications relating to such roads in the first instance; and of hearing appeals against such determinations.

As I hope to show in a later chapter, judicial impartiality is a quality of mind which depends on more subtle considerations than the application, however strict, of the principle that a man may not be judge in his own cause. Judicial fairness involves psychological elements far beyond the reach of rules which touch mere externalities, and is not secured by prohibitions which only prevent a man from having a financial or an emotional interest arising from kinship in the case he is trying. But first things come first; and there is no need to underrate the rules which we have described in the preceding pages. They have at least laid the foundation for that integrity of mind which we have come to expect from all who perform the judicial function.

<sup>a</sup> A much larger transfer of trunk roads to the Minister of Transport took place under the Trunk Roads Act, 1946.

## THE JUDGE MUST ACT PERSONALLY

One noteworthy characteristic of judicial functions exercised in courts of law is the fact that the work of a judge is essentially personal to himself. The great majority of public officials may, and often indeed must, delegate at least part of their work to others, even though the responsibility for it cannot be shifted; but one of the conditions which attaches to formal judicial proceedings is the rule that the judge shall himself personally hear and determine the matter to be decided. A judge who absented himself habitually from court and installed a friend as a permanent locum tenens, or who handed over part of the trial to a subordinate, would not be permitted to remain on the bench. The award of even an arbitrator may be set aside for misconduct if there has been an improper delegation of duty.<sup>9</sup> The Lord Chancellor himself, despite multifarious other duties, is unable to receive assistance in his judicial capacity beyond 'the purely ministerial work of searching for references or finding books'.<sup>1</sup>

In this respect the office of judge presents a sharp contrast to that of administrator. The typical administrator is a single link in a long chain of delegated work, capped at the top by the responsible Minister as supreme delegator. No one dreams for a moment that the Home Secretary or the Postmaster-General is personally concerned in the multitude of good deeds and social sins which are committed daily in his name. The right to delegate lies at the very heart of the modern system of public administration, and the business of government would be impossible were the King's Ministers not able to shift the burden of nearly the whole mass of executive functions which devolves on their shoulders. And of

<sup>9</sup> Russell, *Arbitration and Award*, 13th ed., p. 178; *Haigh v. Haigh* (1861), 31 L.J.Ch. 420; *Newry v. Enniskillen Ry.* (1856), 8 De G.M. & G. 487.

<sup>1</sup> Report of Machinery of Government Committee (of which Lord Haldane, an ex-Lord Chancellor, was Chairman), Cmd. 9230/1918, p. 65.

course the process of delegation takes place no less actively within the hierarchy of the civil service itself. When we receive a letter from Whitehall telling us that the writer is 'directed by the Minister of Labour to say that he has decided' something or other, we know that in all probability the Minister himself has never heard of the matter at all. Unless it be a question of the first importance it has been disposed of by some assistant secretary or principal or less exalted civil servant. But when a magistrate observes that he has decided to determine a case in a particular way, we know that it is he, and he alone, who has personally arrived at the decision.

The courts of justice form, it is true, a hierarchical system of a well-defined type. But that hierarchy differs widely from the hierarchy existing in the administrative service. For in the judicial hierarchy each link in the chain of courts is an autonomous unit free to do its own work in its own way, provided it keeps within the limits of a recognised process. But in the administrative system other conditions prevail. The kind of work which is to be done, and the manner of doing it, is in all cases ordered from above, except in so far as the highest ranks of officials are concerned. The authority of the higher courts is exerted over the *decisions* of the judges of the inferior courts and not over their persons; whereas the authority of an administrator over his subordinates is a personal jurisdiction which (subject only to the brooding solicitude of the Treasury) covers every aspect of the official activities of the latter.

#### THE LIS INTER PARTES

The distinguishing feature of the judicial power, said Bentham,<sup>2</sup> is that an interested party must come to the judge and require him to determine a matter in controversy ;

<sup>2</sup> *Works*, Vol. 3, pp. 198-199.

and the party to whom the order of the judge may prove detrimental must have the right to oppose. Here we have an analysis of what is involved in a *lis inter partes*.

The idea of a suit between parties is inseparably bound up with the conception of the judicial function. Since time immemorial the judge has always been depicted as a third party, aloof and impartial, holding the scales evenly between impassioned parties to a dispute, a Solomon before whom two mothers claiming possession of but a single babe might lay their case. In English law even a prosecution for murder takes the form of a dispute between the King and one of his subjects, the prisoner, both of whom submit to the jurisdiction of the court.

An attempt has been made on many occasions to make the existence of a suit between parties the conclusive test of judicial functions. Thus Professor J. C. Gray<sup>3</sup> thinks that the distinction between administrative and judicial functions, when exercised by the same person, is illustrated by the capacities in which the visitor of a college acts. The visitor may make general visitations for inspection purposes whenever he chooses, and he is then acting administratively. He may also hear complaints from members of the college against the master and fellows, if called upon to do so, and when deciding a controversy in this manner he is then performing a judicial function. Lord Herschell, in a leading case in the House of Lords, observed in a similar way that justices of the peace, in deciding whether to grant liquor licences, are not acting judicially because there is no *lis inter partes* before them. Persons objecting publicly to the grant of a licence are not, in his view, parties to the proceedings in any real sense. The question, he said, is not one *inter partes* at all. The justices of the peace have an absolute discretion to determine, in the public

<sup>3</sup> *The Nature and Sources of the Law*, p. 309; cf. *Philips v. Bury*, 2 T.R. 346-348, Holt, L.C.J.



interest, whether a licence ought to be granted, and any member of the public may object on public grounds apart from any individual interest of his own. The applicant seeks a privilege, and the citizen who objects 'merely informs the mind of the court to enable it rightly to exercise its discretion' whether to grant that privilege or not. A decision that a licence should not be granted is a decision that it would not be for the public benefit to grant it. 'It is not a decision that the objector has a right to have it refused. It is not, properly speaking, a determination in his favour.'<sup>4</sup> The objector should not, therefore, be regarded as the other 'party', unless, indeed, the public as a whole be regarded in that light. In the ordinary sense there is no *lis*, no dispute between parties personally interested in the decision, and no determination in favour of one side. A similar point of view prevailed in the United States, where the object of evidence in licensing applications was held to be not merely the establishing of facts necessary to prove private rights (for no one possessed any property in the right to sell liquor) but 'to inform the conscience of the court, so that it could act intelligently and justly in the performance of a public duty'.<sup>5</sup>

There is no doubt that a suit between parties is a characteristic commonly present in judicial functions performed in courts of law. But it is possible to make too much of it. We cannot say rigidly that without a *lis inter partes* there can be no judicial act; and that wherever the *lis* and the *partes* exist, there also will be found the judge---unless we are prepared to throw overboard Lord Herschell's narrow interpretation of those terms. To say that the only person capable of being a

<sup>4</sup> *Boulter v. Kent Justices*. [1897] A.C. 556, at p. 569.

<sup>5</sup> *Raudenbusch's Appeal*, 120 Pa. 342, 14 Atl. 150; Supreme Court of New Jersey, 1902; *Dodd v. Francisco*, 68 N.J. Law 490; 53 Atl. 219.

<sup>6</sup> *Shell Company of Australia v. Federal Commissioner of Taxation*, [1931] A.C. 295-6.

'party' to a controversy is a private person or a corporation seeking to enforce individual rights, is to advocate a conception more fitted to the nineteenth century than to the twentieth. We must now regard the public as very definitely a 'party' to certain kinds of proceedings which are decided judicially. It was, indeed, the failure of the judicature to endow the general public with an enforceable interest in matters where a regard for the social good is of the first moment that led to the development of the Administrative Tribunals which we shall describe later.

We have, again, to remember that a large amount of judicial work is concerned with *ex parte* applications, where there is but a single suitor before the court. Moreover, a great part of the jurisdiction of the Chancery and Probate Divisions of the High Court in regard to the administration of trusts, wills and other matters is exercised by the court without the judge being required to adjudicate over anything in the nature of a dispute between conflicting parties. Often it is merely the permission or declaration of the court which is sought by an executor or trustee; yet it is difficult to suggest that such proceedings are not judicial.

On the other hand, if we would keep to a true view of the judicial function, we must include within its ambit the activities of all those persons other than judges who have at one time or another to decide controversies great or small, even where no legally enforceable right is concerned. Everyone must to some extent feel himself to be a judge when his decision is sought by two friends in momentary dispute, whether they be a couple of business men who have fallen out about a contract, or a boy and girl quarrelling over a toy. The question whether the rights in issue are legal rights or moral rights or natural rights (if such exist!) is immaterial. There are more judges under the high heavens than those who sit in courts.

On this view, then, we can conceive a *lis inter partes* existing whenever a person finds himself called upon to decide a controversy between others, whether he is an administrative official, or a business man, or a peacemaker among friends.

But, we must note, an essential element is represented by the passivity of the judge, who remains inactive until called upon to exercise his jurisdiction. It is on the motion of one or both of the parties that the judicial process is put in train. The judge himself is powerless to initiate the proceedings, to act *motu proprio* without being called upon first.<sup>7</sup> It is in this voluntary submission to the decision of the tribunal by at least one of the parties that the essence of the judicial function lies.<sup>7</sup> Without it, no stable judicial system is possible; for a decision imposed on those who do not seek it by a body to which there is no submission is not felt to be justice at all. It is a commonplace to say that the problem of keeping the peace by means of settling international disputes by judicial methods depends in the main on obtaining a submission to the tribunal on the part of the nation states concerned.

This brings us to what is a fundamental distinction between courts of law and unofficial tribunals. In the case of an official court, it is the submission of the plaintiff or prosecutor alone which is voluntary; the submission of the defendant in civil cases, or the prisoner in criminal trials, is compulsory when the judicial process has once been set in motion. In the case of most unofficial tribunals the adjudicator cannot function unless both parties submit voluntarily.

In this respect the administrator differs fundamentally

<sup>7</sup> It may be said, of course, that few persons accused of crime submit voluntarily to the decision of the court. They are seized and brought before it, and its sentence is enforced upon them willy-nilly. This is true; but it is also true to say that everyone living in a civilised community by implication submits to the prevailing criminal code and the courts which enforce it.

from the judge. The executive official, be he inquisitorial, or regulatory, or originative, possesses an inherent right to initiate action by his own motion. Administration without initiation is almost unimaginable in present circumstances. The administrator does not originate continuously; nor does he always originate wisely or effectively. But it is nevertheless an undeniable fact that every administrative body has what an American writer calls 'a continuing responsibility for results'<sup>8</sup> of a sort which is unknown to the judge. 'It must ferret out violations, initiate proceedings, and adopt whatever proper methods are necessary to enforce compliance with the law.' [This duty of spontaneous, self-motivated activity may be contrasted with the enforced passivity of the judge, who must wait, spiderlike, till someone enters the web of his jurisdiction. Judges are, as a matter of fact, usually as fully occupied as administrators; but that does not prevent what we have said above from being a true analysis.]

#### THE RIGHT TO BE HEARD

Of all the characteristics of judicial functions none is more essential than the right to a hearing. The safeguards of civil liberty find expression in few principles of greater importance, according to English legal notions, than that embodied in the maxim that every man is entitled to his day in court. In this respect English law is rather sharply differentiated from the various brands of Roman law prevailing on the Continent, where much of the work that is carried out here in open court is done by the method of interchange of papers between the judge and the parties.<sup>9</sup>

According to English ideas the judge is under an

<sup>8</sup> Gerrard C. Henderson, *The Federal Trade Commission*, p. 91.

<sup>9</sup> Cf. Sir Maurice Amos, 'A Day in Court at Home and Abroad', *Cambridge Law Journal*, June, 1926.

absolute duty to fix a time and place for the trial, presumably at a convenient spot and reasonable hour. Of course in the normal course of events the trial takes place in the public court buildings during regular hours, but the existence of a well-established routine need not blind us to the underlying obligation.<sup>1</sup>

In that given place and at that given hour the litigants have a right to see each other and to confront their judge, enthroned amid the trappings of the law. Both sides of the case must be heard, and the entire trial conducted in a way which should enable any intelligent stranger present in court from the beginning to follow it. The extent to which this right of access to the individual mind of the judge is prized will be shown in a later chapter when we come to describe the litigation and public discussion which have circled around the point.

Each party has a right to hear what is put forward by the other party in support of his case, in order that it may be controverted if possible, and the facts on which the argument relies be shaken in cross-examination. A confirming authority for the grant of liquor licences (quarter sessions, acting through a committee) is a judicial body and must exercise their functions judicially. Accordingly, they must hear the parties who appear before them, they must hear both sides and must give an opportunity for those parties to make applications in the court in which they are sitting judicially. If these conditions are not fulfilled their decision will be quashed.<sup>2</sup> Sir Edward Troup, writing of the duty performed by the Home Secretary, before the Court of Criminal Appeal was set up in 1908, of reviewing criminal cases as a final court of appeal, observes that the chief disadvantage arising from the old arrangement was that 'there being

<sup>1</sup> Russell, *Arbitration and Award*, 13th ed., *passim*.

<sup>2</sup> *R. v. Huntington Confirmation Authority, Ex p. George and Stamford Hotels, Ltd.*, [1929] 1 K.B. 698

no public hearing, no one knew what evidence was received or why alleged evidence was rejected'.<sup>3</sup>

In all the formal courts of justice the rule obtains that the proceedings must be public.

The necessity for maintaining what is called open court overrides the power of the court to regulate its own procedure which otherwise exists, and yields to no lesser consideration than the paramount duty of the court to see that justice is done. A mere belief by the judge that a hearing *in camera* is desirable in the interests of decency or morality will not be sufficient to enable the court to sit behind closed doors.<sup>4</sup> This principle that publicity must prevail in judicial activities refers primarily to proceedings in court, but it is applicable also to many other judicial acts of a less formal nature. Arbitrations are usually not open to the general public, but an award may be set aside if the arbitrator excludes persons entitled to be present.<sup>5</sup>

Exceptions to the general rule, that both criminal and civil cases must be heard in open court, occur only where there is a compelling reason based on public policy. Thus, a court may sit *in camera* where the public safety requires,<sup>6</sup> or where the ends of justice would themselves be defeated by publicity, as, for example, where an injunction is being sought to restrain the disclosure of confidential or secret information of certain kinds,<sup>7</sup> or where the presence of the public would hinder or prevent witnesses from giving evidence. Legislation has recently empowered a court to exclude the public where a child or young person is called as a witness in proceedings for an offence against decency or morality.<sup>8</sup> Under the Acts

<sup>3</sup> *The Home Office*, pp. 58-59.

<sup>4</sup> *Scott v. Scott*, [1913] A.C. 417.

<sup>5</sup> Russell, *op. cit.* p. 178.

<sup>6</sup> *Halsbury's Laws of England* (Hailsham edition), Vol. 13, para. 827.

<sup>7</sup> *Ibid.* Vol. 18, para. 108.

<sup>8</sup> Children and Young Persons Act, 1933, ss. 37 and 39.

relating to the guardianship of infants and the adoption of children the Lord Chancellor may make rules for ensuring that the proceedings are conducted in private.<sup>1</sup> Here the interests of the child is recognised as having overriding force.<sup>2</sup>

Both the right to a hearing and the condition that publicity shall prevail are characteristics peculiar to the judicial process. Most legislative bodies throw open their deliberations to the general public; but it is rare indeed that administration can be observed in the making, as it were, save by those with a special claim to favour.<sup>3</sup> If we are negotiating a matter with the Treasury or a local authority, or other administrative organ, we should not claim to be entitled as of right to see the particular official who is to declare our fate; nor to witness the inner workings of the machine as it grinds out a decision in the matter which concerns us. The practice of giving members of the public official interviews, and of conducting business in the course of them, is one of the most striking changes in civil service methods which has taken place in recent years. But the method is still far from widespread; and an interview with an official, though commonly accorded, is not a right. Moreover, the official who conducts the interview may not necessarily decide the matter.

#### ACCORDING TO THE EVIDENCE

The hearing of the case, when it comes before the court, must be conducted in accordance with a known and established procedure. We shall defer until a later

<sup>2</sup> Guardianship of Infants Act, 1925, s. 7 (2); Adoption of Children Act, 1926, s. 8 (2).

<sup>3</sup> The granting of a certificate by the Lord Lieutenant of a county that it is necessary or expedient for the War Office to take land required under the Defence Act for military purposes is not a judicial but an administrative act; and the landowner has therefore no right to be heard in protest (*Hutton v. Att.-Gen.*, [1937] 1 Ch. 427. In *Hearts of Oak Assurance Co., Ltd. v. Att.-Gen.*, [1932] A.C. p. 392, the House of Lords decided that an examination into the affairs of an industrial assurance company is not a judicial proceeding and may not be held in public.

chapter consideration of the psychological processes which are involved in the exercise of the judicial function; but we may notice here certain characteristics in the nature of formal rules. The most obvious of these is the one which prescribes that the decision of the court must be 'in accordance with the evidence'. Jeremy Bentham went so far as to denote the necessity for having proof of the facts on which a claim is founded as one of the three distinguishing features of judicial power,<sup>2</sup> although this is actually a comparatively modern development.<sup>3</sup>

The stipulation that the verdict must be 'in accordance with the evidence' is a very vague expression; and unless it can be reduced to quantitative terms, does not in itself convey a great deal of meaning. A judge may not decide that a particular set of facts exists without *any* evidence; but the amount of evidence which is sufficient to support a decision in any given direction may be very small. Nevertheless, an important feature of court proceedings is the rule that what is sought to be proved must be established by evidence given in open court in the presence of both parties. Secret information may not be received from one side or another; the quiet tip behind the other fellow's back which is regarded with such favour in financial circles, the special information received secretly which may make a fortune overnight in business, is overwhelmingly distasteful to the common law; and an arbitrator who indulges in secret information from either side is liable to removal or to have his award invalidated. Nor in the ordinary course of events may evidence be taken on behalf of one party in the absence of the other.<sup>4</sup>

The taking of evidence consists in the process of establishing the existence of certain facts believed to be

<sup>2</sup> *Works*, Vol. 3, pp. 198-199.

<sup>3</sup> Edward Jenks, 'According to the Evidence' in *Cambridge Legal Essays*.

<sup>4</sup> *R. v. L.C.C., Ex p. Commercial Gas Co.* (1895), 11 T.L.R. 337; *Errington v. Minister of Health*, [1935] 1 K.B. 249.



necessary for the proper determination of the question to be decided. The methods of proof comprise, in the case of the courts of law, an elaborate code of rules, all of which are ultimately dependent on sense-perceptions. The facts so sought to be proved may consist of almost any secular phenomenon, from the motives which induce a man to leave his money to a stranger to the position of a lamp-post on a slippery highway. Often the underlying sequence of causes which have produced a particular event is ignored, or ruled out as inadmissible, and the mere resulting effect alone taken into consideration.<sup>1</sup> But this varies with the circumstances in each case.

What we are here concerned to observe is that judges are in general much more closely confined to the evidence than administrators. That is to say, it is assumed that they must not 'notice' or be influenced by any fact connected with the matter under consideration which is not formally proved in evidence. Private information or an acquaintance with matters of common knowledge, apart from the minimum acquirements necessary to enable the adjudicator to receive the testimony offered to him in the course of the proceedings, is supposed to be prohibited so far as he is concerned.

One of the most interesting chapters in the history of English law is the change in the position of the jury, which in the eighteenth century became transformed from 'a body of neighbours expressly invited to speak of their own knowledge as to certain facts' to a group of citizens sworn to draw logical conclusions from facts of which they have no personal knowledge, but which have been testified to by the witnesses examined before them.<sup>2</sup> Professor Jenks very significantly referred to the early body

<sup>1</sup> A practice not confined to courts of law. George Eliot wrote: 'We judge others according to results; how else?—not knowing the process by which results are arrived at' (*The Mill on the Floss*, book 7, ch. 2).

<sup>2</sup> E. Jenks, 'According to the Evidence' in *Cambridge Legal Essays*; J. B. Thayer, *Treatise on Evidence at the Common Law*.

as the 'administrative jury', and pointed out that much of its work consisted in answering administrative inquiries, often of a fiscal character, directed to it by royal officials.

The position of the jury appears, indeed, to have become assimilated in this respect very closely to that of the judge. The jury may, it is true, still make use of its 'general knowledge' concerning the facts of a case, though this is seldom done nowadays in practice.<sup>3</sup> But even then a juror is under a duty to declare his knowledge in open court on his juror's oath and not to state it privately to his colleagues.<sup>4</sup> When provision was made in the Housing Acts for the compulsory acquisition of land by a local authority and it was considered desirable that the arbitrator appointed to assess compensation should 'act on his own knowledge and experience' rather than on the bare evidence tendered him in his official capacity, it was necessary for a statute to give him power to do so in those very words.<sup>5</sup>

The administrator is, of course, in a much freer position so far as the evidence is concerned. He may act without evidence, he may act against what evidence there is, or accept as evidence testimony of a kind which would not for a moment be admissible in a court of law. Yet it is nevertheless true that administrative authorities again and again find it necessary to establish standards of evidence which must be satisfied before action is evoked. For example, the British Foreign Office will not issue a passport unless they are satisfied that the applicant is a respectable person fit to receive diplomatic protection abroad if required. The person seeking a passport is required to produce evidence of a particular kind testifying as to his respectability; and the decision of the Controller of the Passport Office is arrived at virtually 'according to

<sup>3</sup> *R. v. Rosser* (1836), 7 C. & P. 649, Parke, B.

<sup>4</sup> Halsbury, *Laws of England* (Hailsham Edition), Vol. 19, p. 314; Duncomb, *Trials per Pais*, c. 11, citing Plowden's Commentaries.

<sup>5</sup> Housing, Town Planning, etc., Act, 1909, Sched. I (8).

the evidence', though in law there is no necessity for the Foreign Office to be guided by that or any other system.

#### THE CASE IN HAND

One noteworthy characteristic of judicial function is the rule that, in theory at all events, {only the immediate issue in hand shall be determined} Professor Dicey regarded this as an indispensable element of judicature; for, speaking of the judges of the Supreme Court of the United States and the manner in which they control the action of the constitution, he remarks 'they nevertheless perform purely judicial functions, since they never decide anything but the cases before them'.<sup>6</sup>

The strength of the English system of law lies, according to Dean Pound, in this very preoccupation with the particular controversy under discussion.<sup>7</sup> Unlike the Roman law, it resolutely refuses to take any interest in the logical development of abstract conceptions.

[It is the case in hand, in short, which holds the centre of the stage in judicial proceedings. Each case must, in theory at least, be judged on its own merits; and although the judge does in practice lay down general rules which will decide future cases, no future case may actually be determined unless and until it reaches the courts.] Nor will a point of law be decided unless it arises in connection with the case before the court. Practising lawyers, of course, follow the leading cases in the law reports and advise their clients in accordance therewith, secure in the certain knowledge that the principles laid down therein will be followed when occasion arises; but no judge may in law determine a class of case in advance,<sup>8</sup> or decide the issue in a single instance until the matter comes before him in open court. A case must not be a chose jugée, in

<sup>6</sup> *Law of the Constitution*, 9th ed., p. 163.

<sup>7</sup> *The Spirit of the Common Law*, p. 3.

<sup>8</sup> *Auditor Curle's Case*, Hil. 7 Jac. 1, Coke Reports, Vol. 11, p. 3.

theory at least, however certain the result may be in view of the principles laid down in previous cases. The administrator, on the other hand, may deal with whole classes of cases at a stroke and dispose of a thousand instances with but a single wave of the pen.

#### A FINAL DECISION

The chief reason why we maintain an elaborate system of law courts is, when all is said, in order that some acceptable means may exist for arriving at a decision which shall finally conclude the question under controversy once and for all. It is obvious, therefore, that one of the main characteristics of the judicial function as exercised in courts of law is that the decision of the tribunal shall finally determine the matter. The extent to which the decision of a particular court is final varies largely according to circumstances. The finding of a court of first instance on questions of fact is usually final in England; the decision of the court on questions of law is occasionally final, but is nearly always subject to a right of appeal to the higher courts. But whether or not in any given case it is necessary for a litigant to ascend the whole hierarchy of courts in order to attain finality is a mere detail, for the element of conclusiveness is in any event inherently rooted in the judicial process. The position is, indeed, that the decision of a judicial body acting within its own jurisdiction is final unless and until it is appealed against by the dissatisfied party, according to whatever procedure may be prescribed.

The basis of the conclusiveness of judicial determinations is the fact that behind the judge's authority to decide stands the power of the executive to enforce. In the great majority of cases, other than criminal trials resulting in punitive sentences, the mere knowledge that the organised police power of the community looms in the background behind the words of the judge is sufficient to

effect a carrying out of the judgment of the court.<sup>9</sup> But it is the knowledge that the determination of the judge will be enforced if need be by the organised civil force of the community that gives to a judicial decision its special attribute of finality.

Yet the power to enforce is not an essential mark of the judicial function. The Supreme Federal Court of the United States is the most important national tribunal in the world. Its decisions concern matters of the deepest import to civilisation and are widely respected throughout the United States; but it possesses no constitutional power to enforce its decisions on member states of the Union. At least, up to 1916, the court, which had by then decided over forty cases in which state sued state, had not only never attempted to exert power over a state, but had invariably declared itself to possess no coercive power. Nevertheless, during the 160 years which have elapsed since the Supreme Court was set up, all kinds of interstate controversies involving territorial and economic questions have come before it to be decided; and peaceful acquiescence and obedience to the court's decree has been the rule.<sup>1</sup> In 1918, for the first time, Chief Justice White, in the *West Virginia Case*, declared that 'judicial power essentially involves the right to enforce'. But he was ignoring the past history of the court in one important respect. In England, again, the Industrial Court, which was set up in 1919 to adjudicate upon various kinds of controversies concerning wages and conditions of employment arising between employers and workers, possesses in

<sup>9</sup> That is, so far as is practicable. We must obviously exclude cases where damages are awarded against a man who has not the means to pay them. It is in order to avoid the possibility of such cases that legislation requires the owners of motor vehicles to be insured against third party risks. Preventive action of this kind is outside the scope of the judicial function.

<sup>1</sup> See an excellent article entitled 'Power to Decide, None to Enforce' by James N. Rosenberg in the *Nation*, New York, December 9, 1925.

most cases no powers to enforce its awards compulsorily. Nevertheless, the awards of the Industrial Court have so far invariably been put into operation without any external sanctions.

The declaration by a court of what the correct determination of a controversy should be according to the doctrines of the law is the essential part of the judicial function; and we may distinguish it, for purposes of analysis, from the application of the sanctions of the law. One can imagine, indeed, a society (situated on what Lord Keynes would have called 'the extreme left of celestial space') in which all sanctions were abolished and the conclusions of the judges invariably put into operation by the voluntary action of the persons affected. Such a community would have to consist of 'just men made perfect' to a higher degree than any of which we now have knowledge; but the judges would none the less be performing true judicial functions despite the fact that the power to enforce had ceased to exist.

In the ordinary business of administration it appears at first sight as though there were a finality about many administrative decisions no less complete than that which attaches to judicial determinations. We are assessed to income tax, and pay without more ado; the local authority decides to build a school, and puts its decision into practice with what appears an inexorable resolution; the London County Council declares its intention of rebuilding Waterloo Bridge, and there seems to be an end to the matter, so far as the law is concerned.

On a closer examination, however, it can be seen that administration according to law involves one very important factor which often qualifies the finality of the decisions of an administrative body; namely, liability to review by the courts.

Judicial review of administrative acts is far too large a subject for me to deal with here, although it must be mentioned as a potential limitation on the finality of administrative decisions. It must be understood, however, that the liability to review by the courts does not extend by any means to all administrative acts.<sup>1</sup> Many classes of administrative decisions and acts are excluded by Act of Parliament from the scrutiny of the courts; many others are excluded by virtue of the rules of law which the courts have themselves evolved;<sup>1</sup> that is, by judicial self-limitation; and yet a third category of cases is excluded by reason of procedural difficulties. Without asserting that judicial review covers anything like the whole field of administrative action, it is nevertheless true that well-established principles of common law and equity render the actions of an administrative authority liable to challenge in the courts whenever any question arises as to jurisdiction, excess of power or its abuse.

Normally there is in such cases a judicial review on any question of law; and often a review on question of fact as well.<sup>2</sup> In other words, we can compel the administrative body concerned to produce in court the legal warrant in virtue of which it claims the power to assess us to income tax, to build the school with our money, to tear down the masterpiece which Rennie flung across the Thames and to construct another fine bridge in its place. Furthermore, in the case of a judicial function, the force and validity of a decision depends, not only on the fact as it actually exists, but on the fact as it has been determined to exist by the judge. That is to say, liability may be imposed by the mere decision, regardless of whether it be erroneous in law or in fact. It is otherwise in the case of administrative power. For then, 'if

<sup>1</sup> Cf. Ernst Freund, 'The Right to a Judicial Review in Rate Controversies', 27 *West Virginia Law Quarterly* p. 211.

the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind', and the happening of the contingency may be questioned in an action brought to test the legality of the act.<sup>3</sup>

We can see, then, that where an administrator is given power, by statute or common law or in virtue of the royal prerogative, to do certain things, his actions may be questioned on the ground that he has acted in excess of his power.<sup>4</sup> (We shall see later that there are certain other considerations which limit his discretion in various ways, but we are not concerned with those at the moment.) That may not seem a very powerful reservation to the conclusiveness of administrative decisions. It will not enable a man to get a passport issued to him when the Foreign Office is prejudiced against him because of his political views; nor enable an advanced dramatist to get his play passed by the Lord Chamberlain if that official happens not to believe in free trade in progressive ideas.<sup>5</sup> But in a very large number of cases it does ensure that before the organised civil power of the community is put into force at the behest of the administrator in the execution of public business the whole question is potentially open to review by the courts. There is a real difference between this and the finality of judicial decisions.

#### CONCLUSION

We have endeavoured in this chapter to give a brief outline of some of the main characteristics of judicial

<sup>3</sup> *R. (Wexford County Council) v. L.G.B.*, [1902] 2 Ir R. 349, Palles, C.B.

<sup>4</sup> *Hall v. Manchester Corporation* (1915), 84 T.L.C. 732

<sup>5</sup> Cf. *Sir W. Trevelyan v. H. & O. Office* n. 201



functions as exercised in courts of law; and to compare and contrast those characteristics with the analogous features of administrative functions. We do not pretend to have given a complete description. A very large number of details have been omitted, such as the position occupied by the jury, inherent right of self-regulation belonging to courts of law,<sup>6</sup> their special power of imposing the payment of costs on the parties to the proceedings,<sup>7</sup> and so forth. In particular, nearly all reference to formal rules of procedure has been omitted.

The aim has not been to give a description, complete in every meticulous detail, of the institutional features of the judicial system, but rather to present a broad outline of the leading characteristics of the judicial function, and to omit unessential details from the picture altogether. The purpose we have had in mind has been to crystallise the essential characteristics of what may be called the formal judiciary—that is, the conventional courts of law—in order that the nature of the administrative tribunals which we are about to describe may clearly stand out. We must understand the normal before we can comprehend the abnormal. In the following chapter we propose to describe the mass of official or governmental tribunals which have grown up outside the court system and which constitute, in our contention, a revival of administrative justice in England.

But perhaps I may anticipate an objection which might well be raised by a careful observer of legal and political institutions. What have been described in the foregoing pages, it might well be said, are the outward features of the judicial process. The fundamental part of that process has been left out altogether. Not a word has been

<sup>6</sup> *R v. Denbighshire Justices* (1816), 15 L.J.Q.B. 338.

<sup>7</sup> *Society of Accountants in Edinburgh v Lord Advocate*, [1924] W.C. & Ind. Rep., p. 285.

said about the inner working of the process: the application of a body of law by a mind with a special outlook. A discussion about courts of law without reference to the judicial mind which is enthroned in them may be likened to a presentation of Hamlet without the Prince of Denmark.

The answer is: all in good time. First the flesh and then the spirit. First the organs and then the mind of justice. If the reader will bear with me, he shall in due course have a discussion concerning the judicial mind in operation both in courts and outside of them.

## CHAPTER 8

### ADMINISTRATIVE TRIBUNALS

The Railway Courts—The Traffic Commissioners—The Judicial Functions of the Minister of Transport—The Road and Rail Appeal Tribunal—The Judicial Functions of the Minister of Health—National Health Insurance Tribunals—National Medical Service Tribunals—The Judicial Powers of the District Auditor—The Judicial Functions of the Board of Trade—The Judicial Functions of the Home Secretary—The Judicial Functions of the Minister of Fuel and Power—The Judicial Functions of the Electricity Commissioners—The Judicial Functions of the Minister for Town and Country Planning—The Judicial Functions of the Minister of Education—Independent Schools Tribunals—Tribunals for Unemployment Insurance—Tribunals for Unemployment Assistance—Pensions Tribunals—The New National Insurance Scheme—National Service Tribunals—Reinstatement Tribunals—Tribunals for Industrial Injuries—Tribunals for Family Allowances—The London Building Tribunal—Furnished Rent Tribunals—The Registrar of Friendly Societies and Industrial Assurance Commissioner—War Compensation Tribunals—The Commission on Awards to Inventors—Conclusion

It has already been pointed out that the social legislation of the past seventy years has introduced an entirely new element into the British Constitution, or, to state it more accurately, has reintroduced an old element in a new form. That development consists in the placing by Parliament of a large and increasing number of judicial functions, essentially similar in type to those which normally go to be decided in the various courts of law, in the hands of the great departments of State, or under the jurisdiction of tribunals controlled directly or indirectly, or appointed by, executive ministers of the government. As we have already seen, there is nothing novel in the spectacle of a variety of judicial and administrative, and even legislative, functions being placed on the complacent shoulders of a single representative or nominee of the central government, such as the justice of the peace; but

it will be remembered that the judicial duties of that officer, and to a large extent his administrative acts as well, were at all times subject to review by the Court of Quarter Sessions, and ultimately by the King's Bench,<sup>1</sup> and the justices were accordingly never really outside the potential control of the judicature.

What we now find, however, is that large judicial duties of an important character have been given, not to persons holding judicial office, not even to known and ascertainable individuals, but to vast departments of the state, huge administrative organisations employing thousands of anonymous civil servants. In many cases the responsible ministry does not itself perform the judicial function in question, but is empowered to set up and regulate the tribunal which is to do the work. This does not affect the principle involved, however, because a vital feature of the whole arrangement is the fact that there is no appeal to the regular courts of law. This fact distinguishes the tribunals which we are about to describe from the bodies of so-called judicial commissioners which are sometimes regarded, somewhat erroneously, as constituting a system of administrative justice. In the case of the Commissioners of Income Tax, for example, or the Railway and Canal Commission, there is an appeal to the High Court of Judicature on questions of law, and it is only on questions of fact that the Commissioners' decision is final. In order to make the distinction clear, we shall describe shortly the composition and powers of the Railway and Canal Commission and certain cognate bodies.

#### THE RAILWAY COURTS

The Railway and Canal Commission is an interesting example of a body whose structure and functions lie

<sup>1</sup> *18 J. Goodnow, 'The Writ of Certiorari', 6 Political Science Quarterly,*  
n. 591

midway between those of a court of law, on the one hand, and an administrative tribunal, on the other. The Commission came into existence at a time when the strict legalism of the mid-Victorian era was beginning to yield to certain social necessities to which the industrial revolution gave rise, but before public opinion had become reconciled to a type of administrative tribunal which subsequent legislation has produced in abundant measure.

The Railway Commission arose, in the first place, as a result of the great amalgamating movement which took place among the British railway companies during the second quarter of the nineteenth century. It was feared by Parliament that the increased monopoly which resulted from amalgamation would deprive the public of the good service and low rates which competition, according to prevailing notions, was certain to secure. Parliament accordingly passed in 1854 the Canal and Railway Traffic Regulation Act,<sup>2</sup> which laid down the principles that every railway company should afford proper facilities for forwarding traffic, and that no preferences of any kind should be given. The Act sought to indicate, if not to define, the duties and obligations of the railway companies, and to establish machinery to enforce these obligations and duties. Every railway or canal company was to 'afford all reasonable facilities for the receiving and forwarding and delivering of traffic' on their system, and for the return of rolling stock; and no company was to 'make or give any undue or unreasonable preferences or advantage' to any person or firm or class of traffic, or to manifest 'any undue or unreasonable prejudice or disadvantage' towards anyone. Reasonable facilities for receiving and forwarding traffic on continuous lines owned by separate companies were to be granted, so that 'all reasonable accommodation' might at all times be afforded to the public. Where these conditions were not fulfilled,

<sup>2</sup> 17 & 18 Vict. c. 31

complaints might be made to the Court of Common Pleas, which might issue an injunction to restrain the continuance of the grievance, and enforce the same by means of severe penalties. The court was to make such inquiries as it thought fit, and the judge might be assisted in the investigation by engineers, barristers and other experts.

It was at first intended that, where a complaint was made out to the satisfaction of the High Court, the matter should be referred to the Board of Trade, which should then propose a scheme for the proper working of the railway, to be enforced after approval by the court. But this idea, which was included in the Bill as originally drafted, was struck out through the influence of the railway companies and the matter left entirely to the jurisdiction of the court.

A few test cases were brought before the courts under this statute by important business undertakings whose interests were injuriously affected by the lack of adequate traffic facilities. But, as the Select Committee on Railway Companies Amalgamation reported in 1872, 'complaints have been made that the difficulty and expense of taking a case before the Court of Common Pleas are such as to deter any but wealthy traders who have a great interest from contesting easements with the powerful railway companies; and questions of undue preference are often so technical, so dependent on special circumstances of railway management, and so closely connected with questions of "due facilities" as to lead your committee to the conclusion that even this part of the Act has not been as much brought into play as it would have been if speedy and summary reference could have been made to a tribunal having practical knowledge of the subject'.

The committee thought that the functions committed

<sup>3</sup> Report from Joint Select Committee on Railway Companies Amalgamation, Parliamentary Papers, 1872, Vol. 13, Reports from Committees, p. 67.

to the Court of Common Pleas were so foreign to the ordinary functions of a court of justice that the failure of the Act was not a matter for surprise.<sup>4</sup> One thing appeared obvious to them from the inquiry which they had made, namely, that it was 'difficult to provide any fixed or self-acting rules which will, through the medium of self-interest, or of the ordinary action of law, do what is necessary to protect the public'.<sup>5</sup> Every witness had suggested that there should be an appeal to some board or tribunal, which should settle disputes and achieve, in fact, 'what self-interest or the law itself cannot do'.<sup>6</sup> The committee consequently recommended that a new body of commissioners should be set up. The commissioners, who were to be not fewer than three in number, were to include an eminent lawyer and a person acquainted with railway management. They were to see that rates and fares were duly published and adopted by the companies; to investigate complaints of unfair differentiation as between traders or areas; to see that proper facilities were given for the interchange and forwarding of traffic; to enforce the maintenance of the canals owned by the railway companies and to control the tolls on such canals, and to settle various classes of disputes arising between railway companies and their users. The procedure of the commission was to be as simple and inexpensive as possible.

In the following year these proposals of the committee were embodied in the Regulation of Railways Act of 1873; and the jurisdiction of the courts under the Railway and Canal Traffic Act, 1854, and other railway statutes was vested in the three commissioners and two assistant commissioners who were to be appointed under the statute.

<sup>4</sup> *Ibid.* p. 68.

<sup>5</sup> *Ibid.* p. 93.

<sup>6</sup> *Ibid.*

In 1888 another statute was passed, and the existing commissioners were superseded by the present Railway and Canal Commission. This body consists of two commissioners (one of whom must have had experience in railway business) appointed by the Crown on the recommendation of the Home Secretary,<sup>7</sup> and a third commissioner, who is a judge of the High Court, nominated in England by the Lord Chancellor.<sup>8</sup> The Commission exercises all the powers vested in its predecessors under the Act of 1878 and later statutes, and it thus possesses a jurisdiction in all disputes concerning the legality of tolls and rates for merchandise traffic or terminal charges; and the commissioners also determine complaints in respect of undue preference or traffic facilities and decide questions relating to accommodation works. Proceedings may be taken by anyone complaining of any violation or contravention of the law relating to traffic facilities or undue preference, or by anyone else affected by a matter over which the Commission has jurisdiction. Complaints may also be made by representative bodies such as local authorities, justices of the peace in Quarter Sessions, chambers of commerce, and so forth. Bodies of this kind need not show themselves aggrieved in the sense of having suffered a legal or other injury; and they can appear in opposition to a complaint where the commissioners think that they represent interests which are affected.

There are several features of the Railway and Canal Commission which give it the appearance of an administrative tribunal. Thus, there is no appeal from its finding on any question of fact or any matter respecting the locus standi of a complainant. It has wide power to hear and determine controversies between parties who are

<sup>7</sup> Ministry of Transport Act, 1919, s. 2 (3); S. R. & O. 1919 (1901).

<sup>8</sup> In Scotland the ex-officio judge is nominated by the Lord President of the Court of Session, and similar local arrangements are also made in Northern Ireland.



contending on standards of transport service rather than seeking to maintain legally enforceable rights of property or person. Many of the questions it has to decide, such as the fairness of charges, are matters of administrative policy rather than definite questions of law. The qualifications of two of its members are administrative or commercial rather than legal or judicial in the ordinary sense. Its procedure is less formal than that of a court of law.

But despite these characteristics, the Railway Commission has, since 1888, borne a far closer resemblance to a court of justice than to an administrative tribunal. The Act of 1888 not only provided that a judge of the High Court should *ex officio* be a member of the Commission and preside over its deliberations but it also laid down that the opinion of that judge should prevail on any point which, in the opinion of the commissioners, is a question of law. Furthermore, there is an appeal on any question of law to the Court of Appeal. The sanctions which the Commission may apply are essentially those of a court of law: it may award damages, it may issue injunctions and writs of attachment, and inflict heavy penalties for disobedience. And, as though to remove all possible misconceptions, the Statute of 1888 deliberately enacted that the Commission should be a Court of Record.<sup>9</sup>

During the war of 1914-18, the British Government commandeered the railways of the country for national purposes. On handing them back to the companies after the conclusion of hostilities, the Coalition Government insisted on a compulsory amalgamation of the two or three hundred separate railway undertakings into four large groups. The Railways Act of 1921, which effected this reorganisation, contained important provisions

<sup>9</sup> See the following statutes: 36 & 37 Vict. c. 48; 51 & 52 Vict. c. 25, 58; 52 & 53 Vict. c. 57; 54 & 55 Vict. c. 12; 55 & 56 Vict. c. 44; 56 & 57 Vict.

relating to the Railway and Canal Commission and other adjudicating bodies.

Part II of the Act enlarged the scope of the Railway and Canal Commissioners by giving them power, with a view to securing the public safety or to promoting the interests of the public or of a particular trade or locality, to require a railway company 'to afford such reasonable railway services, facilities and conveniences' on their line as the Commission might order—including the provision of extensions and improvements not exceeding a cost of £100,000 in any one case. All that is required as a condition precedent for the exercise of this enormous new power is an application from a representative of the interests affected.

This was something in the nature of an attempt to 'de-judicialise' the Railway Commissioners by emphasising the executive element in their work; for under the new statute the formulation and enforcement of policy is clearly a more dominant feature than the settlement of disputes. The settlement of a controversy between an aggrieved person and a railway company appears more as a nominal excuse on which to hang the regulation of railway administration than as the true object of the coercive powers of the Commission.

While, however, the regulatory powers of the Railway Commission were largely increased in regard to questions of service and running facilities, it was relieved of its functions in regard to rate fixing and other economic matters by the creation of an important new body known as the Railway Rates Tribunal, which was set up to deal with that class of question.<sup>1</sup>

The Railway Rates Tribunal consists of three permanent members, one of whom is a business man, one

<sup>1</sup> Railways Act, 1921, Part 3.

a railway expert, and the third a lawyer, who presides.<sup>2</sup> In addition, two panels were set up, one containing representatives of trading, labour, passenger and agricultural interests, and the other representatives of the railway companies. A member from each panel is to be added to the Rates Tribunal whenever the Tribunal or the Minister of Transport thinks it desirable. A shipping panel was added, from which an additional member is drawn when the Tribunal is reviewing rates or charges which compete with coastwise traffic.<sup>3</sup>

The jurisdiction of the Tribunal is very wide; it extends over such matters as alterations in the classification of merchandise, the variation of through rates, the fixing of standard, exceptional and agreed charges, group rates, tolls, terminal charges, and the reasonableness of various other charges and service conditions. It determines minimum charges and minimum chargeable distances. A question of outstanding importance was the settlement, shortly after the new grouping, of the standard charges to be made by the new amalgamations. The statute provided that each group should submit a schedule of proposed charges to the Tribunal, which was to determine the same after hearing objections. These standard charges were to be such as would, together with other sources of revenue, be likely to yield 'with efficient and economical working and management' an annual net revenue—the standard revenue as it is called—equivalent to the aggregate net revenues received by all the separate companies in the year 1913, plus certain additional sums.

Here was a truly Herculean task. The mere discovery of the standard net revenue of 1913 took the Tribunal many months of hard work to ascertain; much cerebral activity on the part of the companies and their legal and

<sup>2</sup> The members are appointed on a joint recommendation of the Lord Chancellor, the President of the Board of Trade and the Minister of Transport

<sup>3</sup> Road and Rail Traffic Act 1929, s. 39 (6)

financial advisers was directed towards getting the figure fixed as high as possible; and on the part of the consumers of transport services towards keeping it as low as possible.

The Tribunal has jurisdiction to determine disputes between a trader and a railway company as to the amount of any toll; terminal services; rent for private sidings or structural accommodation; demurrage and siding rent; charges for transshipment; charges for provision of trucks; collection and delivery charges; the use of coal drops, waterside accommodation or any other service for which no authorised charge is applicable; and many other matters. It adjudicates on disputes between passengers and a railway company as to what should be regarded as passenger luggage and what are reasonable fares on steamboats.

When the London Passenger Transport Board was established the Railway Rates Tribunal was made the authority for increasing or reducing fares on the Board's system, on the application of a local authority or the Board. It can vary suburban passenger fares on the main line railway companies. On the application of a local authority it may prohibit or permit (subject to conditions) the withdrawal or reduction of services provided by the Board or suburban services operated by the main line companies. It can require the Board to provide new or improved services and facilities, including the restoration of services which have been withdrawn.

The Railway Rates Tribunal is by statute a Court of Record and is to be judicially noticed. Its decisions are not subject to review save on questions of law, which may be taken to the Court of Appeal. The questions to be determined need not apparently even come before it in the form of a controversy. It is, in fact, far more definitely an administrative tribunal, both as regards its structure and functions, than the Railway and Canal Commission. And this despite the fact that in law it is a Court of

Record and possesses many of the outward attributes of a court of law.

But although both the Railway and Canal Commission and the Railway Rates Tribunal differ widely from an ordinary court of law, and embody administrative elements to a high degree, neither of them presents a really characteristic example of an administrative tribunal of the English type. In contrast to the High Court of Justice, they may appear to be administrative bodies, but when we compare them with more typical organs of administrative law, the resemblance which they bear to the courts of justice is more marked than the differences.

The Transport Bill, which is at present before Parliament, has as its main purpose the setting up in Great Britain of a publicly-owned system of inland transport and of port facilities. The Bill will abolish the Railway and Canal Commission and transfer its jurisdiction to the Railway Rates Tribunal, which is to be renamed the Transport Tribunal. The Bill also introduces important changes in regard to the judicial functions of the Minister of Transport and the Road and Rail Appeal Tribunal. Details of the Bill in respect of these matters are given in the Appendix.

#### THE TRAFFIC COMMISSIONERS

The Road Traffic Act, 1930, instituted an elaborate system of regulation over road passenger transport and set up the Area Traffic Commissioners as the controlling bodies. England and Wales were divided for this purpose into ten large regions, with a further two for Scotland. In each of these areas a body of traffic commissioners was appointed, consisting of a full-time chairman and two part-time members, except in London, where the chairman acts alone. The Commissioners are appointed by the Minister of Transport. He is free to choose whoever he thinks fit to be chairman, but one of the other two

commissioners must be drawn from a panel of persons nominated by county councils within the area and the third commissioner must be selected from a panel nominated by county boroughs and urban districts.

The chairman had originally to be appointed for a fixed term not exceeding seven years, but they now hold office during His Majesty's pleasure.<sup>4</sup> They are subject to retirement at the age of seventy, but any commissioner may be removed from his office by the Minister for inability, misbehaviour or the acquisition of a financial interest in a passenger transport undertaking. A Member of Parliament is disqualified from being a commissioner. The Minister may appoint deputies to act in place of the chairmen in case of illness, incapacity or absence. He provides the commissioners' staffs and accommodation and fixes their salaries in consultation with the Treasury.

The Area Traffic Commissioners are endowed with the power and the duty of issuing licences under Part IV of the Road Traffic Act, 1930. They are also to exercise such other powers and perform such other duties as are conferred or imposed on them by the Act or in pursuance of it; and subject to these requirements they are to act under 'the general directions of the Minister'.<sup>5</sup>

There are several different kinds of licences required in connection with the operation of motor transport services.

First, there is the public service vehicle licence for any motor vehicle used as a stage carriage, express carriage or a contract carriage. This licence is personal to the holder and can be refused, revoked or suspended if the conduct of the applicant or holder shows that he is not a fit person to possess the licence.<sup>6</sup> It relates nevertheless to specific vehicles; and a licence permitting a motor vehicle to be used for passenger services cannot be

<sup>4</sup> Chairmen of Traffic Commissioners, etc. (Tenure of Office) Act, 1937.

<sup>5</sup> Road Traffic Act, 1930, ss. 62 and 63.

<sup>6</sup> *Ibid.* s. 67

granted unless a certificate of fitness has been issued in respect of that vehicle by a certifying officer appointed by the Minister.<sup>7</sup> This certificate is to show that the prescribed conditions of design, maintenance, etc., have been complied with in the interest of safety. The issue of certificates of fitness is not within the jurisdiction of the commissioners but is controlled directly by the Minister through the certifying officers and examiners who assist them.

The most important instrument of control is the road service licence, for it is the means of effecting the economic regulation of the industry. It is required for all stage and express carriages. The commissioners are free to grant or refuse a road service licence in respect of any route. In exercising their discretion they are enjoined to have regard to an elaborate series of criteria such as the suitability of the route, the extent to which the proposed service is necessary or desirable in the public interest, and 'the needs of the area as a whole in relation to traffic (including the provision of adequate, suitable and efficient services, the elimination of unnecessary services and the provision of unremunerative services) and the co-ordination of all forms of passenger transport, including transport by rail'.<sup>8</sup>

The commissioners have power to attach to a road service licence whatever conditions they consider will promote these objectives. In particular, conditions may be imposed to secure that fares are not unreasonable and are so fixed as to prevent wasteful competition with alternative forms of transport along the route or in proximity to it; and that the safety and convenience of the public are served.

The Act requires the commissioners to hold public sittings for hearing and determining applications for the

<sup>7</sup> *Ibid* ss. 67, 68.

<sup>8</sup> *Ibid* s. 72

grant and backing of road service licences. They may hold public sittings for other purposes, but it is not incumbent upon them to do so. At a public hearing not fewer than two commissioners must be present.

Drivers and conductors of public service vehicles also require licences, and the applicants for these must satisfy certain statutory conditions. It is a criminal offence for an unlicensed person to drive or conduct a motor bus, and it is also an offence to employ an unlicensed person to act in either of these capacities.<sup>9</sup> The Minister may make regulations as to the conduct of licensed drivers and conductors; and the commissioners can at any time suspend or revoke a licence to drive or conduct on the ground of unfitness by reason of misbehaviour or physical disability.

The functions of the Area Traffic Commissioners under the 1930 Act were confined to the issue of these several classes of licences relating to passenger road transport. Three years later, however, the Road and Rail Traffic Act, 1933, introduced a system of licensing for vehicles engaged in road haulage. Three classes of licences were laid down, namely, those for public carriers of goods (A licences); limited carriers (B licences); private carriers (C licences). The chairmen of the Traffic Commissioners (and the solitary Traffic Commissioner in the metropolitan area) were made the licensing authorities.

A commissioner has full discretion to grant or to refuse an application for an A or B licence; and once again the Legislature enjoins him to have regard to various economic, technical and personal considerations in exercising his powers.<sup>10</sup> Every licence is subject to a number of statutory conditions relating to the maintenance

<sup>9</sup> *Ibid.* s. 77.

<sup>10</sup> Road and Rail Traffic Act, 1933, s. 6.



of vehicles, their speed, weight, etc., the hours of work for drivers and the keeping of records.<sup>1</sup>

It is quite impossible to attempt to give here even a bare outline of the vast mass of business which has come before the Area Traffic Commissioners in respect both of passenger and goods vehicles, or to summarise the principles on which their decisions have been based. The subject is so voluminous that it requires detailed and specialised treatment.<sup>2</sup> Only by such concentrated methods would it be possible to analyse the effects of the commissioners' work or to inquire how far they have succeeded in carrying out the ambitious policies enunciated by Parliament in the Traffic Acts. All we can assert is that the Area Traffic Commissioners have exerted a profound influence, mainly of a restrictive kind, on the several branches of the road transport industry.

What primarily concerns us here is the nature of the institution and the powers which it exercises. Professor Cushman, a well-known American political scientist, remarks that 'the Area Traffic Commissioners are not a court, but a body of administrative officers'.<sup>3</sup> This is true so far as it goes, but it is not a complete statement of the position. The Traffic Commissioners are by no means ordinary administrative officers, either in the civil service or the local government sense. In the first place, they have statutory duties and powers conferred on them directly, and therefore may be regarded as public officers. Secondly, they are required to act under the 'general directions' of the Minister, and this does not give the Minister a right to interfere in any particular decision or make him responsible to Parliament for the specific actions of the commissioners.<sup>4</sup> Third, the chairmen are

<sup>1</sup> For the effect of the Transport Bill at present before Parliament on the system of licensing, see Appendix.

<sup>2</sup> See D. N. Chester, *Public Control of Road Passenger Transport* (1936) for an excellent introductory study of the early years.

<sup>3</sup> Robert E. Cushman, *The Independent Regulatory Commissions*, p. 545.

<sup>4</sup> See *Public Enterprise*, edited by W. A. Robson on this point, p. 362.

men of reputation and standing who would not be disposed to be mere servants of the Minister. But it was never the intention, either of Parliament or the Minister, that they should be ordinary departmental officials.

The Traffic Commission is in many respects an administrative tribunal in embryo. It represents a stage of development midway between the exercise of judicial functions by a government department without differentiated organs for the purpose and the emergence of a fully articulated administrative tribunal. It is well on the way towards the latter concept and embodies several of the characteristics of such an institution.

I have assumed throughout this account that the Traffic Commissioners are exercising judicial functions, and I imagine that no one would seriously dispute this contention. Applicants for road service and hauliers' licences commonly find themselves confronted with objectors in the form of the railway companies or other road interests, and the Commission is then in a position of deciding a conflict of interests between contending parties by the light of the basic principles embodied in the legislation. The insistence on a public hearing for road service and haulage licences, the right of parties to be represented by counsel, the procedural requirements laid down by the Minister, all point clearly to a recognition that the commissioners, though composed of 'administrative officers', are exercising judicial powers.

#### THE JUDICIAL FUNCTIONS OF THE MINISTER OF TRANSPORT

The Road Traffic Act, 1930, provides that appeals from decisions of the Area Traffic Commissioners should be to the Minister of Transport. A right of appeal is conferred on applicants who have been refused public service vehicle licences or road service licences or who are dissatisfied with any condition imposed by the commissioners; on

local authorities or transport operators who have unsuccessfully opposed the grant of a road service licence or who are aggrieved by any condition attached to such a licence; on the holder of a public service vehicle or road service licence which has been suspended, revoked or varied; and on certain classes of persons who are aggrieved by the decision of a certifying officer in respect of various matters.<sup>6</sup> Where an appeal is made to the Minister he has power to make whatever order he thinks fit, and the order is binding on the commissioners or the certifying officer.

The Ministry of Transport appears to be the only central department (apart from the Home Office<sup>6</sup>) on which is conferred the power of hearing appeals in regard to the granting of licences. This departure from established constitutional practice occurred for almost the first time in the Roads Act, 1920, in connection with omnibus licences. It has not been followed in the case of drivers' and conductors' licences, where an appeal from refusal, suspension or revocation by the Traffic Commissioner lies to the local court of summary jurisdiction. Nor, as we shall see later, has the departmental principle been adopted in regard to appeals from the commissioners concerning road haulage licences.

The Minister of Transport also exercises a wide variety of judicial functions in regard to railways, roads, bridges and ferries. He is authorised to settle differences between owners or occupiers of land and a railway company concerning the proper places for openings in the railway to effect communication with the railway.<sup>7</sup> He can determine a dispute between local authorities who are

<sup>6</sup> Section 81. But see Appendix for the changes proposed by the Transport Bill now before Parliament.

<sup>6</sup> The Home Office hears appeals from a refusal by a local authority to grant a licence for storing petrol. See Petroleum Act, 1871, s. 10; also Sir Edward Troup, *The Home Office*, p. 195.

<sup>7</sup> Railway Regulation Act, 1840, s. 19.

jointly working or paying the cost of a ferry.<sup>8</sup> He can hear an appeal by an urban district council against the refusal of a county council to take over the maintenance and repair of county roads within the district, or against the county council's refusal to delegate to the district council the task of maintaining, repairing and improving certain types of roads.<sup>9</sup> He can, on the application of a local authority or of the owner of a bridge, order the bridge to be reconstructed or improved, direct by whom it shall be maintained and provide for its transfer to the highway authority.<sup>9</sup> Anyone who is aggrieved by a restriction or prohibition placed on the use of a bridge by the authority responsible for it can appeal to the Minister, who can remove or vary the restriction.<sup>1</sup> He has similar powers in regard to the restriction or prohibition of traffic on highways.<sup>2</sup>

One interesting example of the Minister's judicial functions relates to the determination of compensation to local government officers who suffered loss of office due to the changes introduced by the Road Traffic Act, 1930.<sup>3</sup> Here the Minister of Transport determines the amount of compensation in the first instance. If the claimant is aggrieved by his decision he can appeal to the Treasury, whose decision is final. It is exceedingly rare to find one department of the central government acting as an appellate tribunal in respect of the decisions of another department. The practice clearly militates against the constitutional conception of the unity of the central government as a whole.

The Minister of Transport now exercises through his officials a wide range of judicial functions under

<sup>8</sup> Ferries (Acquisition by Local Authorities) Act, 1919, s. 1 (3).

<sup>9</sup> Local Government Act, 1929, ss. 32 (4) and 35 (4).

<sup>6</sup> Bridges Act, 1929, s. 3 (2).

<sup>1</sup> Road Traffic Act, 1930, s. 25 (5).

<sup>2</sup> Road Traffic Act, 1930, ss. 47-48.

<sup>3</sup> Fourth Schedule

the Merchant Shipping Acts and related statutes. Responsibility for administering this legislation lay with the Board of Trade until 1939, but it has now been transferred to the Minister of Transport. Under the Merchant Shipping Acts the Minister is entrusted with the determination of a large number of questions in dispute between those who earn their living by the sea. For example, a marine superintendent employed by the department is empowered by statute to determine disputes between the owner of a fishing boat and the skipper or seaman of the boat concerning either of the latter's wages or his share in the profits of a voyage or a fishing catch. He can also decide any dispute regarding the engagement, service or discharge of a skipper or seaman, and any question respecting the cost, quantity or quality of the provisions supplied to the crew. The marine superintendent's decision is final and binding; and is enforceable as though it were an order of a court of summary jurisdiction.

A master, mate or engineer is liable to have his certificate suspended or cancelled by the Minister of Transport if he is convicted of any offence. The certificate can also be suspended by a court holding a formal investigation into a shipping casualty or by a naval court, if they find that the officer in question was to blame for a wrongful act or default. Similar action can be taken by a court inquiring into the conduct of a master, mate or engineer if it is satisfied that he is incompetent, or has been guilty of gross misconduct, drunkenness or tyranny.<sup>4</sup> The Minister may, in any of these cases, re-issue and return to a master, mate or engineer his certificate which has been cancelled or suspended. Alternatively, he can shorten the time for which it is suspended, or grant in place of it a fresh certificate of the same or lower grade. These restorative powers are to be exercised only if the

<sup>4</sup> Merchant Shipping Act, 1934, s. 470.

department ' think that the justice of the case requires it ' '—a clear indication of the judicial nature of the function.

Another type of jurisdiction possessed by the Minister of Transport is the settlement of disputes between a harbour or conservancy authority and a general lighthouse authority concerning their respective statutory powers for the removal of wrecks in tidal waters or near a harbour approach. Here, again, Parliament has made the department the final arbiter on questions both of fact and of law. The Merchant Shipping legislation confers several other judicial powers on the Ministry of Transport. For example, the department is to determine disputes arising in the United Kingdom as to the amount payable to wreck receivers (who are often coastguard or customs officers) by way of expenses or fees.<sup>6</sup> It can investigate, and then allow or disallow claims of creditors against the property of deceased seamen or apprentices with an absolute discretion in dealing with subsequent claims where no claim has been substantiated within six years after the Board has received the property.<sup>7</sup> It can hear complaints that a pilotage authority has refused or failed to perform its duties in regard to examining candidates for a pilot's licence or a pilotage certificate; or in granting the licence or certificate after examination; or that the authority has conducted an examination improperly or unfairly, or imposed unreasonable or illegal conditions on a licence or certificate. If the Minister considers a complaint is in any respect well founded he can make such order as he thinks fit to redress the fault.<sup>8</sup>

#### THE ROAD AND RAIL APPEAL TRIBUNAL

It was pointed out above that when a system of licensing control over road haulage vehicles was instituted by the

<sup>6</sup> Section 474.

<sup>7</sup> Section 567.

<sup>8</sup> Section 179.

<sup>9</sup> Pilotage Act, 1913, s. 27.

Road and Rail Traffic Act, 1933, the power of determining appeals from the Traffic Commissioners was not conferred on the Minister of Transport. Instead, a special tribunal was set up for the purpose. This was partly due to a desire on the part of the road haulage industry to have a completely independent body of a more formal kind, and partly to the unfavourable impression created by the Minister's failure, in hearing appeals on road passenger transport cases, to state the reasons for his decisions or to give written decisions.<sup>8</sup>

The Road and Rail Appeal Tribunal consists of three members. The full-time chairman, who must have legal experience, is appointed by the Minister of Transport after consultation with the Lord Chancellor. The other two members, who serve part-time, are appointed by the Minister after consultation with the President of the Board of Trade and the Secretary of State for Scotland. The Minister may remove members for inability or misbehaviour after similar consultation.<sup>9</sup>

The Tribunal makes its own rules of procedure with the approval of the Lord Chancellor, the Lord President of the Court of Session and the Minister of Transport.

The jurisdiction of the Tribunal extends to the hearing of appeals by applicants for the grant or variation of licences who are aggrieved by the decision of the Traffic Commissioners or by any condition attached to a B licence. Objectors also have a right of appeal, and so, too, do the holders of licences which have been revoked or suspended.

The Road and Rail Appeal Tribunal is a much more legalistic and judicialised organ than the Traffic Commissioners, or even the Railway Rates Tribunal, although the rules of evidence are less strict than those of the ordinary courts. A public hearing is invariably given, and it is usual for the parties to be represented by counsel.

<sup>8</sup> Cushman, *op. cit.* p. 525.

<sup>9</sup> Section 15

The transcript of the proceedings before the Traffic Commissioners is never read before the hearing, since it was felt that this might prejudice the case. The Tribunal therefore 'punishes itself by requiring the oral reading of the entire transcript',<sup>1</sup> although this sometimes takes days. Even the findings of fact by the Traffic Commissioners are not necessarily accepted by the Tribunal, since the former have no power to subpoena witnesses and compel the production of documentary evidence—a power which the Tribunal itself possesses. The decisions of the Road and Rail Appeal Tribunal are final, and there is no right of appeal to the courts even on questions of law.<sup>2</sup>

#### THE JUDICIAL FUNCTIONS OF THE MINISTER OF HEALTH

'The Local Government Board', said Madden, J., in 1911, 'is one of several great administrative boards who find themselves, in the course of administration, performing duties which this court regards as judicial. . . .'<sup>3</sup> The Ministry of Health (as successor of the Local Government Board in England) is a department which came early into the judicial arena, and when the first edition of this book appeared the Minister of Health possessed more extensive, numerous and varied judicial powers than any of his ministerial colleagues. Since then his judicial powers have been somewhat curtailed, and he is no longer pre-eminent in this respect. The story of his early judicial functions and the manner in which he lost them is of sufficient interest to warrant a short account of it here, although this chapter is primarily concerned with the present position.

The great Public Health Act passed by Disraeli's government in 1875<sup>4</sup> was the first really determined effort

<sup>1</sup> Cushman, *op. cit.* p. 526.

<sup>2</sup> For the effect of the Transport Bill now before Parliament on the Road and Rail Appeal Tribunal, see Appendix.

<sup>3</sup> *R. v. L.G.B.*, [1911] 2 Tr.R. 331.

<sup>4</sup> The Act of 1875 was really a consolidating measure. The principal Act was passed in 1872.



to bring into existence an elaborate system of sanitation, regardless, in many ways, of private prejudices and private rights. The urban and rural sanitary authorities which were set up thereunder were armed with considerable powers of a coercive and compulsory nature which still form the backbone of our sanitary code, and under a certain well-known section of the Act, section 268, a right of appeal to the Ministry of Health (as successor to the Local Government Board) was given to persons aggrieved by the decisions of a local authority in regard to a whole series of sanitary matters dealt with in various parts of the Act. The owner or occupier of a house, for example, could be required to make a covered drain connecting his house with a sewer. If he refused or neglected to comply, the local sanitary authority could step in and do the work and recover the expenses from the defaulting owner, who could appeal to the Ministry of Health against the decision of the local council. A like method of procedure and a similar kind of appeal were laid down in regard to the recovery of expenditure incurred by the enforcement of provisions for securing lavatory accommodation, the examination of drains alleged to be out of order, the purification of an unwholesome house on the certificate of the medical officer, the abatement of various kinds of nuisances, the provision of a proper water supply for dwelling-houses, the closing of polluted wells, the cleansing and disinfection of premises against infectious disease, and the levelling, paving, metalling and other treatment of private streets.<sup>5</sup>

Section 268, which enacted that an appeal in all these various matters should lie to the Ministry of Health, was of such historic importance that we quote the more significant parts of it in full:—

‘Where any person deems himself aggrieved by the

<sup>5</sup> Public Health Act, 1975, ss. 23, 36, 41, 46, 47, 62, 70, 120 and 150.

decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them . . . he may, within twenty-one days after notice of such decision, address a memorial to the Minister of Health stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Minister of Health may make such Order in the matter as to the said Minister may seem equitable, and the Order so made shall be binding and conclusive on all parties.' The remainder of the section enacted that if the local authority had already commenced proceedings for the recovery of the expenses they should, on receiving notice of the appeal to the Minister, be stayed; and the Minister might thereupon, if he thought fit, direct the local authority to pay to the appellant such sum as he might consider to be a just compensation for the loss, damage or grievance sustained by him in the matter.

In 1930 a departmental committee was appointed by the Minister of Health to consider what amendments should be made in the tangled mass of local government and public health legislation 'for facilitating consolidation and securing simplicity, uniformity and conciseness'. This committee reviewed at length the provisions of the Public Health Acts with regard to appeals from decisions of local authorities, and ruefully reported that they found them exceedingly difficult to interpret. The Act of 1875 contained no general right of appeal against orders and requirements of local authorities, but section 268 gave a right of appeal in specified circumstances to the Minister. The Public Health Act, 1890, on the other hand, gave an appeal to Quarter Sessions to any person aggrieved by any order, judgment, determination or requirement of a local authority under that Act, except where an appeal lay to the Minister under section 268. Subsequent public health

legislation<sup>6</sup> took a similar course. The exact limits of the Minister's jurisdiction under section 268, observed the committee, have been the subject of much litigation. They did not, however, stop to discuss the results of the litigation because they proposed that the existing procedure should be replaced, with one exception, by an appeal to a court of summary jurisdiction in any case where a local authority could require an owner to incur expenditure in executing works or taking other steps to remedy a condition of things detrimental to public health.

This type of requirement formed the most numerous and important class of question affecting individual private interests which local authorities would have to determine under the Public Health Consolidation Bill which the committee had drafted and submitted with their report. As regards the remainder, the committee advised that it would be a mistake to enact any general clause giving a right of appeal, whether to quarter sessions, courts of summary jurisdiction or the Minister, against the orders, requirements, determinations, etc., of a local authority. 'Not every decision of the local authority should be subject to appeal, and . . . it is quite impracticable by the use of general words, such as orders, judgments, determinations or requirements, to distinguish between those from which an appeal should lie and those from which it should not.'<sup>7</sup>

With regard to the proper appellate tribunal, the committee stated baldly they had adopted the view that in general an appeal (where permitted) should lie in the first instance to a court of summary jurisdiction with a further appeal to quarter sessions.<sup>8</sup> They gave no reasons for this choice. They did not explain whether it was

<sup>6</sup> Public Health Acts Amendment Act, 1907, s. 7; Public Health Act, 1925, s. 7.

<sup>7</sup> Local Government and Public Health Consolidation Committee, Second Interim Report, 1936, Cmd. 5059, para. 18.

<sup>8</sup> *Ibid.* para. 19. See clause 283 of the draft Bill submitted by the Committee.

based on principle, prejudice or political pressure. They made no inquiry as to how the Minister had exercised his judicial functions or whether the results had proved satisfactory or unsatisfactory. They did not analyse the reasons which had prompted Parliament to confer judicial powers on an administrative department. They did not discuss the merits of the courts of summary jurisdiction.

In due course, the draft Bill incorporating the committee's proposals became the Public Health Act, 1936. It repealed all the judicial powers of the Minister under existing public health legislation except in one instance. The Minister retains his judicial functions where a local authority, on being satisfied about certain conditions, requires the owner of an occupied house to provide the house with a supply of wholesome water for domestic purposes. If the owner on receiving the notice objects on the ground that the supply is not required, or that the time allowed for doing the work is too short, or that the local authority should themselves provide a water supply for the district or contribute to the cost, he can appeal to the Minister of Health, who may either allow, disallow or modify the local authority's requirement.<sup>9</sup>

Thus, without pother, high argument or disputation, the Minister lost his great judicial powers under the Public Health Acts. They crept out of the Constitution with as little noise as they had crept in. There was no victory march of the judges down Whitehall, nor did the flags fly at half-mast on the government offices.

Although the change might appear to have restored the authority of the courts to its former position, the committee had in one sense come down in favour of the executive on the broader issue of the finality of administrative decisions. For the occasions on which an appeal could be lodged from the decision of a local authority

<sup>9</sup> Sections 134, 139, 168 (3) and 169 (2).

were in future to be limited by specifying in each section a right of appeal if it were intended to confer one, thereby eliminating any general right of appeal against every determination of a municipal body which it was thought may formerly have existed.

The Minister of Health, until a few years ago, also exercised extensive judicial powers in regard to decisions by local authorities affecting the owners of house property. Here, too, a similar recession has occurred in regard to individual houses. The department was itself anxious to be relieved of the responsibility for exercising these powers in regard to individual houses, owing to the heavy cost of providing a qualified staff for this purpose.

The Housing Acts passed between 1890 and 1925 made the Ministry of Health the appellate body in regard to a whole series of important matters closely affecting the rights of owners of slum property and workmen's dwelling-houses. Thus, landlords are required to maintain certain classes of working-class houses in a condition 'reasonably fit for human habitation',<sup>1</sup> and if they do not do so the local authority must step in and request the landlord to execute whatever works are necessary. If the landlord defaults, the local council may themselves carry out the repairs and subsequently recover the expense from the proprietor. Under the Housing Act, 1925, a landlord who was served with a notice requiring him to carry out repairs or other work, or to reimburse a local authority which had acted in default of himself, had a right to appeal to the Minister of Health.<sup>2</sup> Other sections enabled the local authority to close and demolish dwellings unfit for human habitation, and here, again, there was conferred

<sup>1</sup> Housing, Town Planning, etc., Act, 1909, ss. 14 and 15; Housing, etc., Act, 1919, s. 28, now replaced by Housing Act, 1925, s. 3. This supersedes the very small powers given to a local authority under the Housing of the Working Classes Act, 1890.

<sup>2</sup> Housing Act, 1925, s. 3, replacing Housing Act, 1909, s. 15 (6). The provisions of the two statutes differ considerably.

on the landlord a right of appeal to the Minister at almost every turn of the proceedings.<sup>1</sup>

The Housing Acts, 1909 and 1919, laid it down<sup>4</sup> that the procedure in any of these appeals to the central department should be such as the Minister of Health might by rules determine, and the statute also gave him authority to settle the question of costs. The Minister, in regard to any matter brought before him on appeal might make 'such order in the matter as he thinks equitable', and his decision was binding and conclusive on all parties.

All these appellate powers have now been removed from the Minister's jurisdiction, and so far as decisions affecting individual houses are concerned the right of appeal is generally to the courts. The Minister continues, however, to act as an appeal tribunal in regard to a number of housing matters of wider import.

For example, under the present law a local authority may declare an unhealthy area to be a clearance area, and this is the first step in the process of slum clearance. Its purpose is to define an area to be cleared of buildings with the object of redeveloping the land or using it as a recreation ground or open space. When a resolution of this kind has been passed the local authority then has a duty to implement it by means of either a clearance order or a compulsory purchase order. The former imposes an obligation on the owner to demolish the buildings, while the latter transfers the land and premises as they stand to the municipality.

In either event a somewhat similar procedure is prescribed, and the order is submitted to the Minister for confirmation. Interested parties are entitled to object, and if they do so the Minister must cause a public local inquiry to be held. He must then consider the report of the inspector and the objections before deciding whether

<sup>1</sup> Housing Act, 1925, ss. 11 and 14, replacing Housing Act, 1909, s. 17.

<sup>4</sup> Housing Act, 1909, s. 89, as amended by the Housing Act, 1919.

to confirm the order. Once an objection has been lodged the Minister is acting judicially and is bound by the rules of natural justice. The same applies to the inspector whom he appoints to hold the inquiry.

After the Minister has confirmed an order, the only remedy open to anyone who is aggrieved by his decision is to apply to the High Court within six weeks for the order to be quashed on the ground that it is not within the powers conferred by the Act, or that the applicant's interests have been substantially prejudiced by a failure to comply with the statutory requirements. Apart from these very restricted grounds of appeal, the Minister's decision is final and conclusive, and the order cannot thereafter be questioned in any legal proceedings whatsoever.<sup>5</sup>

Another group of judicial functions which the Minister exercises relates to housing estates provided by local authorities outside their own areas. Judicial powers of a quite general character are given to the Minister where he approves a proposal of this kind. Any difference arising between the promoting municipality and the local authority in whose area the housing estate will be situated regarding the carrying out of the project may be referred by either of them to the Minister for his decision, which is final and binding.<sup>6</sup>

Where a scheme of this kind is put into operation, it is often necessary for the promoting local authority to execute works which are incidental to the housing development, such as drainage, roads, and so forth, in the area of the other authority. Where public streets or roads have been thus constructed, the obligation to maintain them falls on the borough or district council in whose area they are situated. The only escape from this often unwelcome liability is if the borough or district

<sup>5</sup> Housing Act, 1936, s. 35.

<sup>6</sup> Housing Act, 1936, s. 82.

council is satisfied that the highways have not been properly constructed in compliance with plans and specifications approved by the Minister. An appeal lies to the Minister from an objection of this kind.<sup>7</sup>

The Small Dwellings Acquisition Act, 1899, empowers local authorities to advance money to residents for the purchase of a house. County councils and county borough councils are entrusted with the administration of the Act, subject to the right of a county district authority to acquire powers by passing a resolution to that effect. A district council with a population of less than 10,000 must obtain the consent of the county council before adopting the Act, and if the latter fails or refuses to give their consent the district council may appeal to the Minister of Health, who can determine the matter.<sup>8</sup>

An entirely different type of jurisdiction is conferred on the Minister of Health in connection with the superannuation rights of local government officers. Prior to 1937 it was optional for local authorities to adopt superannuation schemes, but thereafter it became obligatory to establish them. Under the earlier legislation<sup>9</sup> any dispute between a local authority and an officer concerning the latter's rights to a superannuation allowance was referred to an arbitrator appointed by the Minister or nominated by agreement between the parties. Under the present law, any question touching the rights or liabilities of an employee of a local authority in respect of superannuation is decided, in the first instance, by the local authority. An employee who is dissatisfied with their decision or their failure to come to a decision can appeal to the Minister, whose determination is final. The Minister may, if he wishes, state a case for the High Court on a point of law or he may be directed to do so by the

<sup>7</sup> *Ibid.*, s. 81.

<sup>8</sup> Section 9.

<sup>9</sup> Local Government and Other Officers' Superannuation Act, 1922.



court; but resort to the courts is very rare, and in nearly every appeal the Minister's decision is accepted by the parties as final.

The questions which arise in connection with superannuation disputes are often extremely difficult to determine, both as regards finding the facts and the application of the correct principles of law and equity. Problems occur as to whether an officer has committed misconduct sufficient to justify forfeiture of superannuation rights which sometimes involve issues as important both to the individual and to the local government service as many cases which are tried in the High Court.

The Minister of Health also exercises numerous judicial functions in connection with claims for superannuation allowances by public assistance and asylum officers.<sup>1</sup>

The Minister of Health is also given jurisdiction by several statutes to exercise judicial powers in connection with claims for compensation for loss of office. Thus, the Rating and Valuation Act, 1925,<sup>2</sup> laid it down that certain officers who suffered direct pecuniary loss by abolition of office or by the termination of their appointments or reduction of remuneration in consequence of the Act should be entitled to compensation. A claim is made in the first instance to the local authority concerned and an appeal lies to the Minister, whose decision is final. In the first five years after the passing of this Act more than 300 appeals had been made to the Minister.

A similar power was given to the Minister by the Local Government Act, 1929, in regard to poor law officers affected by the transfer of public assistance functions from the guardians to the county and county borough councils. Several other examples of a similar character could be mentioned.

<sup>1</sup> Local Law Officers' Superannuation Act, 1896, s. 18; Asylum Officers' Superannuation Act, 1909, s. 15.

<sup>2</sup> Section 49 and Sixth Schedule

The Ministry of Health acts as an appellate body under the Rivers Pollution Act, 1876. By that statute it was made an offence to allow noxious matters to flow into a river. But a certificate may be given<sup>3</sup> by a qualified inspector, appointed by the Minister of Health, to the effect that the means used to render harmless sewage or poisonous matter flowing into a stream are the best or only practicable means available in the circumstances. This certificate is conclusive evidence in a court of law, and, in effect, usually makes all the difference between a conviction and an acquittal. The Act lays it down that a person aggrieved by the granting or withholding of a certificate may appeal to the Minister of Health against the decision of the inspector.

The Minister of Health also exercises judicial powers in hearing appeals from the district auditor, but these can be more conveniently described in a later section.<sup>4</sup>

From the time when national insurance was first introduced on a limited scale in 1911, judicial functions in connection with the various schemes have been exercised almost entirely by government departments and administrative tribunals. The courts of justice have played an almost negligible role in determining rights, obligations and disqualifications. Prior to the unification of the various schemes recommended by the Beveridge Report and carried out by the National Insurance Act, 1946, the administration was scattered among several departments. The Minister of Health was responsible for national health insurance and also for widows', orphans' and contributory old age pensions; the Minister of Labour

<sup>3</sup> Rivers Pollution Prevention Act, 1876, s. 12.

<sup>4</sup> *Post*, p. 134-8.

<sup>5</sup> The National Insurance Act, 1946, provides for the repeal of the National Health Insurance Act, 1936, as from the appointed day, but as some time is likely to elapse before this happens the following description of the National Health Insurance Scheme has been included.

had charge of unemployment insurance; while the Customs and Excise officers looked after non-contributory old age pensions. When the Ministry of National Insurance was created, the functions of these other departments relating to the insurance schemes were transferred to the new ministry, but during the transition period the Ministry of Health and the Ministry of Labour and National Service continue to carry them out on an agency basis. I shall therefore refer to these departments in describing the earlier schemes.

The Minister of Health inherited his judicial powers in connection with national health insurance from the commissioners who were appointed in 1911 to take charge of the scheme set up in that year. The judicial functions of the Minister can be divided into three classes.

The first type of case consists of a number of questions which arise in regard to liability to come within the scheme.<sup>6</sup> Thus, the Minister is empowered to determine all questions whether a particular kind of employment is 'employment' within the meaning of the Act; whether a person is or was 'employed' within the meaning of the Act; whether a man is entitled to become a voluntary contributor. Then, again, he has to decide what rate of contribution is payable in respect of an insured person, and who, in cases of doubt, is the employer of a

<sup>6</sup> National Health Insurance Act, 1936, s. 161 (1), replacing s. 66 of the original Act of 1911 and s. 27 (2) of the Act of 1913. The wording of the section is as follows:—

'If any question arises—

- (a) whether any employment or any class of employment is or will be employment within the meaning of this Act, or whether a person is or was a person employed within the meaning of this Act, or whether a person is or was entitled to be a voluntary contributor; or
- (b) as to the rate of contributions payable by or in respect of any insured person; or
- (c) as to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively; or
- (d) as to the person who is or was the employer of an employed contributor;

the question shall be determined by the Minister in accordance with regulations made for the purpose'.

contributor in an insurable employment. In regard to one or two of these questions, anyone who is dissatisfied with the decision of the Minister may appeal on a question of law<sup>7</sup> to a judge of the High Court, whose decision is final, and the Minister has himself a similar right to submit questions to the Court. But this strictly limited right of appeal on specified matters to the High Court is not in practice utilised to any appreciable extent, and the records published by the Minister of 'decisions as to liability to insurance'<sup>8</sup> have a confident air of being an authoritative statement of the law, for all the world like a series of volumes containing cases decided in the courts of law—save that the Minister merely announces his decision without giving reasons for it. Thus, he decides that a chef de partie engaged by an hotel to concoct sauces is employed 'by way of manual labour' within the Act and comes under the insurance scheme regardless of his remuneration<sup>9</sup>; that Salvation Army officers are not employed under contracts of service so as to make them insurable<sup>1</sup>; that neither the captains nor the mates of river barges remunerated by shares of the freight earnings are employed within the meaning of the Acts.<sup>2</sup> These cases, and a score of others, closely resembling those constantly before the courts, in which complex facts have to be classified and thrown into legal categories, come before the Minister for decision. Between the years 1912 and 1932 over a thousand formal decisions were given by the Minister in this class of case, and thereafter there

<sup>7</sup> National Health Insurance Act, 1936, s. 161 (1), provided that: '(1) If any person is aggrieved by the decision of the Minister on any question arising under paragraph (a) or paragraph (d) he may appeal therefrom on any question of law to a judge of the High Court selected for the purpose by the Lord Chancellor, and the decision of that judge shall be final'.

<sup>8</sup> See Memo. 151 C, April, 1925, issued by the Ministry of Health, Gd., H.M. Stationery Office; also Memo. 151 of February, 1914, and Memo. 151 B of April, 1916.

<sup>9</sup> Memo. 151 C, Case 427, p. 4.

<sup>1</sup> *Ibid.* Case 443, p. 11.

<sup>2</sup> *Ibid.* Case 463, p. 20.

remained a substantial flow. Details of 500 departmental decisions have been published, and these, as an official witness stated before the Royal Commission on Health Insurance, constituted 'a body of case law by reference to which other cases may be settled'.<sup>3</sup>

The formal decisions of the Minister are arrived at after proceedings which, where a hearing is given, are not unlike those of an inferior court of law, save that the legal official who conducts the hearing reports but does not decide. In the great majority of cases, however, there is no oral hearing, and the matter is decided after consideration of the information contained in prescribed forms filled in by the parties interested.<sup>4</sup>

The number of cases of this class formally decided each year fell off after the first few years, but this did not mean that the Minister's judicial power had fallen into desuetude. For, said the official witness of the department to the Royal Commission, 'apart from the formal determination of questions, the Ministry's function of deciding what persons are insurable is exercised in practice by means of informal rulings'. It is the policy of the Ministry to avoid as far as possible the giving of formal decisions, and 'by far the greater number of questions, amounting to several thousands annually, are disposed of after any necessary local investigation by an administrative ruling conveyed in the form of a letter or even of a verbal intimation by an inspector'.<sup>5</sup>

There is, as we have already observed, a right of appeal in some cases to a High Court judge,<sup>6</sup> but as the

<sup>3</sup> Royal Commission on National Health Insurance, Appendix to Minutes of Evidence, Part 1, p. 8.

<sup>4</sup> *Ibid.*

<sup>5</sup> Royal Commission on National Health Insurance, Appendix to Minutes, Part 1, p. 8, para. 20. See also the memorandum of evidence submitted by the Ministry of Health to the Committee on Minister's Powers, Vol. 1, pp. 42 and 43.

<sup>6</sup> There was originally a right of appeal to the county court on fact as well as law, but this was exercised in only nine cases and was abolished by the Act of 1920.

opportunity to appeal to the courts is confined to questions of law, this reservation does not curtail the Minister's power to any considerable extent in the majority of cases, since it leaves his jurisdiction to determine questions of fact untouched and absolute. 'As to the facts', said Mr. Justice Roche, in one of these appeals to the High Court, 'assuming that the Minister has directed himself rightly on the law, I cannot come to the conclusion that his decision is wrong in law unless the facts are such that the Minister could not reasonably or properly come to the conclusion to which he has come. . . . It has been put as high by counsel as to say I ought not to hold the Minister wrong in law unless there is no evidence on which the Minister could rightly come to that conclusion. Probably that test is not too high, but even making the test less exact, I am of opinion that upon the facts stated and found by the Minister there is such a balance of evidence as that the Minister could really come to either one conclusion or the other, and having come to the conclusion that he has come to, there is no reason, no power in myself, to disturb this finding.' In another case the same judge observed that there was 'an immense amount to be said for a conclusion opposite to that at which the Minister has arrived as a matter of fact',<sup>7</sup> but added that he was unable to reverse his decision in view of the absolute power of the Minister to determine questions of fact. In several cases, it may be noted, there is no right of appeal from the Minister's decision, even on a question of law.

Another class of judicial act which it falls to the lot of the Minister of Health to perform under the old health insurance scheme is the determination of almost every conceivable type of dispute arising between an approved society and one of its insured members, or between a

<sup>7</sup> Memo. 151 C, X, decision 447, p. 23.

<sup>8</sup> *Ibid.* X, decision 448, p. 25.

society and one of its branches, or between two branches of an approved society. Every society, before it could secure approval, had to make provision in its rules for the settlement of disputes between itself and its members regarding such matters as status in insurance, termination of membership, right to benefit, disciplinary action taken under the rules, and so forth. All disputes are settled in the first instance according to the rules, and there is then an appeal from the domestic tribunal to the Minister of Health. Leave to appeal must first be obtained from the Minister, and the matter is then referred to a referee selected from a panel of lawyers, assisted by a medical assessor in medical cases, or by a woman with experience of social work where the complainant is a woman.<sup>9</sup> The

<sup>9</sup> National Health Insurance Act, 1936, s. 163:—

'Subject to the provisions of this part of this Act relating to the determination of questions by the Minister—

(a) Every dispute, relating to anything done or omitted by that person, society or branch (as the case may be) under this Act or any regulations made thereunder, between—

(i) an approved society, or a branch thereof, and an insured person who is a member of the society or branch or any person claiming through such a person;

(ii) an approved society or branch thereof, and any person who has ceased to be a member for the purposes of this Act of the society or branch or any person claiming through such a person;

(iii) an approved society and any branch thereof;

(iv) any two or more branches of an approved society; and

(b) Every dispute between an approved society and any person as to whether that person is or was at any date a member of that society for the purposes of this Act,

shall be decided in accordance with the rules of the society, but any party to such dispute may, in such cases and in such manner as may be prescribed, appeal from the decision to the Minister.

(2) Every dispute between—

(a) an insured person and an insurance committee;

(b) two or more approved societies;

(c) an approved society and an insurance committee;

(d) two or more insurance committees;

relating to anything done or omitted by such person, society or insurance committee under this Act or any regulations made thereunder, shall be decided in the prescribed manner by the Minister.

(3) The Minister may, subject to the provisions of this Act, authorise referees appointed by him to decide any appeal or dispute submitted to him under this section.

(4) Regulations may be made providing for the procedure on any such

hearing takes place locally, and the appellant is not put to any expense whatsoever.<sup>1</sup> The Minister can in all cases regulate the procedure.<sup>2</sup>

An even wider jurisdiction is given to the Minister to settle disputes in which a local insurance committee, or two approved societies, are involved, since in those cases he has power to decide the question in the first instance. But in any event the determination of the Minister is final and conclusive, whether he decides in the first instance or on appeal.<sup>3</sup>

The third class of case in which judicial power was given to the Minister is in regard to the medical treatment of insured persons or the supply of drugs and appliances by chemists in connection with that treatment. The Minister wields very large powers indeed in this field.

The system provides that every qualified doctor who so desires is entitled to have his name included in the medical list, or panel, of the local insurance committee. In this way he becomes eligible for selection by an insured person as his doctor for medical treatment provided under the scheme. Where complaint is made concerning the service rendered by the doctor to a contributor, if the Minister, after inquiry, 'is satisfied that the continued inclusion in the list of any medical practitioner would be prejudicial to the efficiency of the medical service of insured persons',<sup>4</sup> he may remove the practitioner's name

appeal or dispute, and any such regulations may apply any of the provisions of the Arbitration Acts, 1889 to 1934 . . . but except so far as they may be so applied those Acts shall not apply to proceedings under this section, and any decision given by the Minister or a referee under this section shall be final and conclusive'.

<sup>1</sup> Royal Commission on National Health Insurance, Appendix, Part 1, p. 23, Minutes, Kinnear, Q. 455-501.

<sup>2</sup> Ministry of Health Act, 1919, s. 3 (1) (ii); Statutory Rules and Orders, 1924/1516. For details of the procedure followed, see the memorandum submitted by the Minister of Health to the Committee on Ministers' Powers, Evidence, Vol. 1, pp. 43-44.

<sup>3</sup> National Health Insurance Act, 1936, see s. 163 (2).

<sup>4</sup> National Health Insurance Act, 1936, s. 36.



from the list and disqualify him from inclusion therein for as long as he may think fit—a penal act which would have the result, in the case of thousands of doctors, of depriving them of the greater part of their income.

Regulations made under the Act provide that if representations are made concerning the efficiency of a medical practitioner by an insurance committee, local medical committee or panel committee, the Minister is bound to institute an inquiry, and in other cases he may do as he pleases.<sup>5</sup> Each inquiry is carried out by a body specially constituted for the purpose, consisting of three persons one of whom is a practising lawyer, and the two others medical practitioners. The parties to an inquiry have power under the regulations to compel by subpoena the attendance of witnesses and the production of documents.<sup>6</sup>

Under these regulations inquiries are made into a large number of complaints relating to the skill and professional conduct of medical practitioners on the panel. In a single volume we find investigations as to charges brought against panel doctors in regard to failure to give proper attendance to an old man suffering from a paralytic stroke,<sup>7</sup> the charging of fees to insured persons,<sup>8</sup> the drunkenness of a panel doctor while driving a motor car,<sup>9</sup> the canvassing of patients for transfer from another practitioner's list,<sup>1</sup> the use of objectionable language to

<sup>5</sup> The powers and procedure are described fully in the memorandum submitted by the Minister of Health to the Committee on Ministers' Powers, Evidence, Vol. 1, pp. 44–45. For a full description of the elaborate system of committees which administer the system of National Health Insurance, see Royal Commission on National Health Insurance, 1925, Appendix to Minutes of Evidence, Part 1, p. 81 *et seq.*

<sup>6</sup> *Ibid.* s. 91. Reports of Inquiries and Appeals under the National Health Insurance (Medical Benefit) Regulations, Vol. 3, 1924, Ministry of Health, p. 7.

<sup>7</sup> *Ibid.* p. 19.

<sup>8</sup> *Ibid.* p. 33.

<sup>9</sup> *Ibid.* p. 36.

<sup>1</sup> *Ibid.* p. 43.

insured persons,<sup>2</sup> and the negligent diagnosis of diphtheria as influenza.<sup>3</sup>

In these and other 'matters of a judicial nature' arising under the Act, the Minister is required by the statute<sup>4</sup> to exercise his powers and duties through a special body such as we have described. But this only means that the preliminary work of investigation and report is carried out by the committee of three appointed by the Minister. The business of deciding remains vested in the Minister and his department, and it is for him and his advisers<sup>5</sup> to determine what sentence, if any, shall follow on the recommendations and findings of the committee of inquiry. It not infrequently happens that the Minister overrides the recommendation of the committee.<sup>6</sup>

The punitive powers of the Minister are very large. Not only can he remove a medical practitioner from the panel but he can also impose heavy fines and the payment of costs.<sup>7</sup> Thus, where two doctors in partnership were found to have persistently charged fees for supplying medicine to insured patients, the Minister 'decided that the doctors should not be removed from the Medical List, but that £1,000 should be withheld from the supplementary grant . . . and this sum, together with the costs incurred by the committee in connection with the inquiry, should be recovered from the practitioners by deduction from their remuneration or otherwise'.<sup>8</sup> Various other fines of substantial amounts are imposed in the ordinary course of business.

A similar jurisdiction is exercised by the Minister over

<sup>2</sup> *Ibid.* p. 48.

<sup>3</sup> *Ibid.* p. 53.

<sup>4</sup> National Health Insurance Act, 1936, s. 164.

<sup>5</sup> The Minister is required to consult an Advisory Committee consisting of the Chief Medical Officer, two medical officers of the Ministry and three panel doctors.

<sup>6</sup> Royal Commission, Appendix to Minutes of Evidence, Part 3, p. 471.

<sup>7</sup> Reports of Inquiries and Appeals, etc., p. 7. See also Article 36 of the Medical Benefit Regulations.

<sup>8</sup> Reports of Inquiries and Appeals, etc., p. 62.

persons, firms, and bodies corporate supplying drugs, medicines, and appliances for the use of insured patients. Every supplier of these articles throughout the country has a right to have his name placed on the lists prepared by the local insurance committees, 'except in cases where the Minister after inquiry is satisfied that the inclusion or continuance of that person in the list would be prejudicial to the service'.<sup>2</sup> This enables the Minister to investigate and penalise a large number of offences, such as the supplying of short measure of medicine<sup>1</sup>; inaccurate dispensing<sup>2</sup>; or the making up of prescriptions by unqualified persons.<sup>3</sup>

The exercise by the Minister of Health of jurisdiction over doctors engaged in National Health Insurance work has aroused the most intense opposition on the part of the organised bodies representing the profession. The British Medical Association, comprising some 28,000 practitioners, protested before the Royal Commission on National Health Insurance that the decisions of the Minister are of 'an inexplicable character, and have given rise in the minds of many practitioners to a feeling of injustice or even a suspicion of vindictiveness'.<sup>4</sup> The Medical Practitioners' Union, with a membership of less than four thousand, made up for the comparative insignificance of its size by the furious language with which it condemned the whole system. The entire machinery for dealing with complaints, said the Medical Union, involved, 'such manifest and gross injustices' that they found it difficult in giving evidence, 'to deal with the matter in a temperate spirit'.<sup>5</sup>

<sup>2</sup> Section 39 of the Act.

<sup>1</sup> Reports of Inquiries and Appeals, etc., p. 77.

<sup>2</sup> *Ibid.* p. 80.

<sup>3</sup> *Ibid.* p. 84.

<sup>4</sup> Royal Commission on National Health Insurance, Appendix to Minutes of Evidence, Part 3, p. 450.

<sup>5</sup> *Ibid.* p. 468.

Even more striking as an example of the power given to a department of State to adjudicate on matters of technical detail concerning the conduct of professional work are the appeals heard by the Minister of Health from the decisions of insurance committees to deduct sums from the remuneration of medical practitioners on account of excessive prescribing. Here the Minister has had to decide such nice questions as the appropriate penalty to be imposed on a doctor whose persistence in prescribing antifebrin and phenacetin powders instead of tablets resulted in the average cost of his prescriptions coming to 87.72 pence per insured person as compared with the average cost for the area of 28.18 pence! <sup>6</sup> Or, again, what was to be the punishment which justice required should be meted out to medical practitioners who were guilty of such grave offences as the repeated ordering of 6-oz. instead of 8-oz. mixtures, the employment of tinctures of gentian and calumba when infusions would have done equally well, and 'the unnecessarily frequent ordering of tincture of orange as a flavouring'. <sup>7</sup>

The exercise of these powers is put in motion in the following way. The offence is detected in the first instance by the fellow-practitioners of the accused, who set on foot a complaint 'if it appears to them in the case of any practitioner that by reasons of the character or quantity of the drugs or appliances so ordered or supplied, the cost is in excess of what may reasonably be necessary for the adequate treatment of those persons'—reasonable necessity meaning the average amounts given in similar cases by other doctors in the neighbourhood. But it is the Minister of Health who is responsible for the trial, or, at any rate, for the supreme function of imposing the sentence; and from his decision there is no appeal. 'The

<sup>6</sup> Reports of Inquiries and Appeals, etc., p. 92

<sup>7</sup> *Ibid.* p. 98.

Minister of Health', said *The Times* in protest, 'acts apparently as prosecuting counsel, judge and jury.'<sup>8</sup>

But most remarkable of all are the sweeping powers of a judicial character which are given to the Minister under section 188 of the National Health Insurance Act. Here it is provided that where an approved society or an insurance committee allege that excessive sickness has taken place among insured persons in their district owing to the conditions of employment prevailing in the locality, bad housing, or lack of sanitation, an insufficient or impure supply of water, or a neglect to enforce the health provisions of the factory, mines, public health, housing and similar Acts, the approved society or insurance committee making the complaint may claim from the person or authority alleged to be in default the extra expenditure incurred by the excessive sickness. If the claim is opposed the matter is to be laid before the Minister of Health, who is then to appoint a 'competent person' to hold an inquiry, if he is satisfied there is substance in the complaint.<sup>9</sup> The 'competent person'—who might be an official on the Minister's staff—may order the extra expenditure to be made good by any party he finds to have been in default.

Truly enormous are these last-named powers of the Ministry; but so far they have never been put into operation, for the good and sufficient reason that the whole administrative system of the National Health Insurance scheme makes it impossible to prove a successful allegation of the type contemplated by the section.<sup>1</sup> The great majority of insured persons are members of approved

<sup>8</sup> October 21, 1924.

<sup>9</sup> Where the excess expenditure is alleged to arise from neglect to enforce statutes administered by the Home Secretary or the Board of Trade, the 'competent person' is to be appointed by one of these departments instead of by the Minister of Health.

<sup>1</sup> Royal Commission on National Health Insurance, Minutes of Evidence, Vol. 1, Kinnear, Q. 143-144; Vol. 55, Q. 23,792-4; Brock, Vol. 1, Q. 1470, 1491-1498. As to Scotland, see Leishman, Vol. 1, Q. 2120.

societies; and these societies are not based on geographical areas but have their members scattered throughout the country. There is no co-ordination between the various approved societies of such a kind that an analysis could be made by each society of the sickness in particular areas, and then a correlation obtained from all the results. In the second place, it is the opinion of the chief officials who have so far been in charge of the Insurance Department of the Ministry of Health that it is impossible to isolate the causes of sickness to an extent sufficient to enable the Ministry to make use of its wide powers of punishment under this provision.<sup>2</sup> Slum dwellers, for example, often suffer from irregular and badly paid employment. They also suffer from excessive sickness. It is difficult to assign the excessive sickness to bad housing conditions and to disregard the other causes of bad health which flow from low industrial conditions.

The sweeping extent of the powers of the Minister in this connection appear, indeed, to be equalled only by the impracticability of their character. The Royal Commission on National Health Insurance observed that the section as it stands is 'incapable of effective application' and recommended that the penal provisions should be eliminated and the powers of investigating excessive sickness extended.

But whether they are used or not, it is extremely significant that Parliament should have deliberately given, first to the Insurance Commissioners and later to a Minister of the Crown, gigantic powers of the kind we have described; that a department of the Government should be legally empowered to order damages to be paid by an employer who has neglected to carry out the Factory Acts, to the detriment of his workers' health; by a local authority which has failed to remedy imperfect sanitation or bad housing conditions; by a water company

<sup>2</sup> *Ib.* 1

which has provided an insufficient or contaminated supply of water; by a landlord who has refused to make his houses sanitary and habitable. The Minister's functions are far more extensive than those wielded by many a judge, and from his decision, or that of his nominee, there is no appeal. The doom which he is authorised to pronounce is enforceable in the High Court like a judgment. Furthermore, the Minister of Health may himself take action in the first instance and lodge the complaint if he believes that local conditions are throwing an unnecessary burden on the Health Insurance scheme. Here he would be acting not merely as a judge but also as accuser or party to the complaint.

There are a large number of other matters of a judicial nature which it falls to the lot of the Minister of Health to decide under the National Health Insurance scheme, but it is not necessary to enumerate them here. Those which have been described are sufficient to give an adequate picture of the vast number of judicial functions which come under the jurisdiction of the Ministry of Health in regard to this one subject of health insurance alone.<sup>3</sup>

#### NATIONAL MEDICAL SERVICE TRIBUNALS

In 1946 Parliament accepted the policy of establishing a comprehensive medical service available to all without charge. The National Health Service Act, in which this policy is embodied, contains some interesting provisions conferring judicial powers on administrative tribunals.

Part IV of the Act deals with general medical and dental services, pharmaceutical services and supplementary ophthalmic services. The arrangements for these services are entrusted to executive councils, composed of representatives of the local health authority, of the local

<sup>3</sup> For a description of the system of administrative justice to be set up by the Minister of National Insurance under the National Insurance Act, 1946, see *post*, pp. 176, 191. As to the judicial functions of the Minister of Health regarding claims for pensions, see *post*, pp. 173-176.

medical, dental and pharmaceutical committees, together with persons appointed by the Minister of Health.

Every doctor already engaged in medical practice who wishes to serve as a general practitioner is entitled, if he applies before the appointed day, to be included in the list of doctors available for the public in the area where he is practising. In every other case a doctor must apply in the prescribed manner to the executive council, who must refer applications to their medical practices committee.<sup>4</sup> This committee consists of a chairman and eight other members. The chairman and six of the other members must be medical practitioners; and all but one of the six are to be actively engaged in medical practice. They are all appointed by the Minister after consultation with the organisations which he recognises to be representative of the medical profession. He regulates the terms of their appointment, tenure and vacation of office, fixes their remuneration and allowances, and provides them with staff.<sup>5</sup> He also prescribes the procedure they are to follow.<sup>6</sup>

A medical practices committee may refuse an application by a doctor to practise in its area on the ground that there is already an adequate supply of medical men undertaking general practice in the area. If a certain number of additional practitioners is required and a larger number applies, the committee selects those whom it considers the most suitable, after consulting the executive council, which in turn must first consult the local medical committee, if one exists. A medical practices committee may not refuse an application from a doctor wishing to undertake general practice on any ground other than that mentioned; but it can grant an application subject to conditions which exclude the applicant from practising in specified parts of the area.

<sup>4</sup> Section 34.

<sup>5</sup> Sixth Schedule.

<sup>6</sup> Section 34 (8) (b).



A medical practitioner whose application has been refused or granted subject to conditions, has a right of appeal to the Minister of Health. The Minister, after hearing the appeal, may direct the committee to grant the application unconditionally or subject to such conditions as he may specify. Where certain doctors have been selected to fill vacancies from a larger number of applicants, and one or more of the unsuccessful candidates appeals to the Minister, the committee's determination is held in abeyance until he has given his decision. The Minister, if he allows the appeal, may direct that a practitioner in whose favour he decides shall be added to those chosen by the medical practices committee, or be substituted for one of them. In the latter event, the Minister must specify the name of the doctor to be displaced, and this doctor is then made a party to the appeal and cannot himself bring separate proceedings.<sup>7</sup>

A special tribunal is to be constituted to inquire into representations made by an executive council or any other person that the continued inclusion in the National Health service of a general practitioner, pharmacist, dental or ophthalmic practitioner or optician would be prejudicial to the efficiency of the service. The tribunal is to consist of a chairman, who shall be a practising barrister or solicitor appointed by the Lord Chancellor, and two other members. One of the latter is appointed by the Minister of Health after consulting an association of executive councils, the other is to be a person belonging to the same branch of medical practice as the practitioner whose conduct is under examination, drawn from a representative panel appointed by the Minister.<sup>8</sup>

The tribunal is obliged to inquire into a complaint

<sup>7</sup> Section 34 (6) (7).

<sup>8</sup> Section 42 and Seventh Schedule.

if representations are made to it by an executive council. In any other case it may do so if it pleases. If the tribunal is of opinion that the continued participation of the doctor or other practitioner would prejudice the efficiency of the service, it must direct that his name shall be removed from the appropriate list, and also, if it thinks fit, from any corresponding list kept by any other executive council. An appeal from a direction by the tribunal lies to the Minister, who may confirm or revoke the direction. Unless so revoked a direction is binding on the executive council or councils concerned, which must take the necessary action to enforce it.

The Act requires regulations to be made for prescribing the procedure to be followed by the tribunal and for the making and determination of appeals to the Minister. The regulations must provide that a practitioner who is being investigated shall be given an opportunity to appear before and be heard by the tribunal; and, if he appeals, of appearing before and being heard by a person appointed by the Minister.<sup>9</sup> The regulations are also to make provision for the publication of the tribunal's decisions and those of the Minister.

The Minister of Health is also given jurisdiction in disputes arising under Part IV of the Act, or any regulation made under it, between an executive council and a person receiving, or claiming that he is entitled to receive, any of the services with which Part IV deals, namely, general medical and dental services, pharmaceutical and supplementary ophthalmic services. He is also empowered to determine disputes between an executive council and a local health authority regarding the conduct of a health centre. Any of these disputes shall be referred to and decided by the Minister.<sup>1</sup> These powers will supersede

<sup>9</sup> Section 42. The regulations must permit him to appear personally or by counsel or solicitor.

<sup>1</sup> Section 47

those which have hitherto been exercised by the Minister in respect of medical benefit under the National Health Insurance scheme, described in the preceding pages.

#### THE JUDICIAL POWERS OF THE DISTRICT AUDITOR

In connection with local government affairs we may notice the powers of the district auditor, who occupies a most peculiar and anomalous position in the structure of the British Constitution. He is appointed and removable by the Minister of Health who has also statutory authority to assign and regulate the method of work. The auditor is entrusted with the task of examining the accounts of nearly all the local authorities in the country except municipal corporations<sup>2</sup> and to 'disallow every item of account which is contrary to law'; to surcharge the amount of any expenditure which he disallows upon the person responsible for incurring or authorising it; to surcharge any sum not brought into account upon whoever was responsible for its omission; to surcharge the amount of any loss or deficiency upon anyone whose negligence or misconduct was the cause; and to certify the sum due from any person upon whom he has made a surcharge. A person who is surcharged is legally liable to pay the sum in question to the local authority.

The district auditor is to state on demand the reasons for his decisions. Anyone who is aggrieved by a disallowance or surcharge may appeal to the High Court if the sum involved exceeds £500. If the disallowance or surcharge is less than £500, he can appeal either to the High Court or to the Minister of Health. A similar right of appeal is given to any person who raises an objection to the accounts at the audit and is dissatisfied with the auditor's decision on the matter. The Court or the

<sup>2</sup> He examines the accounts of services for which grants-in-aid are paid even in the case of boroughs; and some boroughs have chosen to have all their accounts so audited. Others have been compelled to accept the district audit as a condition of attaining borough status.

Minister, as the case may be, has power to confirm, vary or quash the auditor's decision on any of these matters. From an appeal going to the Minister a special case can be stated on a point of law to the Court but otherwise the Minister's decision is final.

The significance of the dividing line which separates determinations over £500 from those below that sum is that a person who is surcharged more than £500, in addition to being liable to pay the sum involved, is disqualified for being elected or being a member of any local authority for five years.

A person who is surcharged can apply to the tribunal to which he appeals or could appeal, for a declaration that he acted reasonably or in the belief that his action was lawful. If he can obtain this declaration of innocence the tribunal may excuse him from personal liability to pay the sum surcharged. Where the amount involved exceeds £500, the disqualification from office which would normally follow the surcharge will not apply. A man who is surcharged can ask the Court or Minister for a declaration of this kind certifying that his intentions were good, even though he does not challenge the surcharge itself. It can be seen that, as regards any decision of the auditor relating to a sum not exceeding £500, the Minister and the High Court have a concurrent jurisdiction with identical powers of a legal and equitable nature. Where larger sums are involved the High Court alone has power to hear appeals. The Minister, however, possesses the special power to sanction expenses paid by a local authority, which cannot then be disallowed by the auditor even though they may not be lawful.

There are thus two administrative tribunals to be observed in connection with the central audit of municipal expenditure. In the first place there is the district auditor himself, who, in exercising his powers of disallowance and

surcharge, may be regarded as constituting a tribunal of first instance. In the second place there is the Minister of Health who forms a tribunal of appeal in matters up to £500, concurrently with the High Court.

The auditor's position has been enormously strengthened by the decision of the House of Lords in the *Poplar Wage Case*,<sup>3</sup> in which Lord Sumner said that 'He has to restrain expenditure within proper limits. His mission is to find if there is any excess over what is reasonable. I do not find any words limiting his functions merely to the case of bad faith, or obliging him to leave the ratepayers unprotected from the effects on their pockets of honest stupidity or unpractical idealism'. The learned law lord went on to approve a dictum of Farwell, L.J., to the effect that the district auditor could not claim to exercise control over questions of policy, but he could control administration. Lord Sumner concluded by saying: 'The word, however, is policy, not politics, and I can find nothing empowering bodies, to which the Metropolis Management Act, 1855, applies, which authorises them to be guided by their personal opinions in political, economic or social questions in administering the funds which they derive from levying rates'.

This conception, if applied, would have the effect of substituting the auditor's opinion of what is reasonable in municipal administration for that of the elected council. While district auditors doubtless endeavour in practice to confine themselves in the main to questions involving financial integrity, ultra vires and accounting propriety, they now exert a strong control over the greater part of public expenditure by the local authorities of the country. The auditor is in some respects clearly exercising judicial functions,<sup>4</sup> in others he is performing only inspectorial,

<sup>3</sup> *Roberts v. Hopwood*, [1925] A.C. 578.

<sup>4</sup> *R. v. Lisnaskea Poor Law Guardians*, [1918] 2 Ir.R. 258.

inquisitorial or supervisory duties. Sometimes he appears to be the mere servant of the Minister of Health; at others he figures as an independent officer wielding an irresponsible power subject to little or no control.

Prior to 1927 an appeal from the auditors' decision lay either to the High Court on grounds of law or to the Central Department on broader grounds of equity. The Minister of Health (and before him the President of the Local Government Board) was empowered to review the auditor's decision according to 'the merits of the case'; and he could remit a surcharge on grounds of fairness and equity. The Audit (Local Authorities) Act, 1927, modified the position by disqualifying councillors in the circumstances described above; by limiting the jurisdiction of the Minister; and by assimilating the powers of the court and the Minister in cases where they can act concurrently.

The situation which now confronts an individual on whom the auditor has imposed a surcharge appears to be full of doubt and danger. He will require more insight, knowledge and discrimination than most men are endowed with to decide whether the alleged error of his ways is likely to receive more sympathetic consideration and a less harsh interpretation of nebulous legal doctrines from the High Court or from that mysterious entity 'The Minister'. The ways of Parliament, like those of Providence, are inscrutable. If one dared ask our legislators, in the words of the negro preacher 'to unscrew the unscrutable', it would be interesting to discover on what rational grounds alternative remedies are provided to such entirely different appellate tribunals. It would seem as though the Legislature could not make up its mind which type of tribunal is the more suitable and was leaving the decision to the unfortunate aldermen, councillors and

officers, on whom a surcharge has been imposed, to find out by strictly empirical methods.<sup>5</sup>

#### THE JUDICIAL FUNCTIONS OF THE BOARD OF TRADE

The Board of Trade performs many judicial functions under various statutes of a regulatory character. Under the Weights and Measures Act, 1904, the Board is to determine (at the request of either party) any difference arising between an inspector of weights and measures and any other person as to the meaning or construction of the Board's own regulations or as to the method of testing weights, weighing-machines, measures or measuring-instruments.<sup>6</sup> Under the Bankruptcy Act, 1914, if one-fourth in number or value of the creditors dissent from a resolution of the creditors fixing the remuneration of a trustee whom they have appointed to administer the estate, or if the bankrupt can show that the remuneration is unnecessarily large, the Board of Trade is empowered to fix the trustee's commission or percentage.<sup>7</sup> Every trustee in a bankruptcy is required to transmit at regular intervals a statement of the position and accounts to the Board of Trade. The Board then examines the report and is legally obliged to call the trustee to account for any misfeasance, neglect or omission.<sup>8</sup> Many other judicial powers of the Board of Trade relate to bankruptcy. From the Board's decision an appeal usually lies to the High Court.

The Board of Trade is invested with certain functions of a judicial nature in connection with joint stock companies. Thus the Board is required to take cognisance of the conduct of liquidators of companies which are being wound up. If a liquidator does not faithfully perform his duties and observe all requirements laid on him by

<sup>5</sup> For a full discussion of the whole position see my books: *The Development of Local Government* (2nd ed.) Part IV (Allen & Unwin); and *The Law Relating to Local Government Audit* (Sweet & Maxwell, 1930).

<sup>6</sup> Section 7.

<sup>7</sup> Section 82.

<sup>8</sup> Section 97.

law, rules or otherwise touching the performance of his duties, or if any complaint is made against him by a creditor, the Board is to inquire into the matter and take such action as it may consider expedient.<sup>9</sup>

Under the legislation relating to the registration of business names, the registrar must refuse to register any business name containing the word 'British' or any other words which in his opinion are likely to lead people to believe that the business in question is under British ownership or control, if that is in fact incorrect. If the business name is already registered he must remove it from the register. An appeal lies from the registrar's decision to the Board of Trade, whose determination is final.<sup>1</sup>

A very wide range of judicial powers is conferred on administrative authorities in connection with trade marks, trade names and designs. The officer primarily concerned with executing the legislation is the Comptroller-General of Patents, Designs and Trade Marks, who comes under the Board of Trade. The Comptroller-General acts as registrar for the registration of trade marks, which is an essential condition for the acquisition and creation of this valuable form of commercial monopoly.

Where the registrar refuses to register a trade mark, or accepts it subject to conditions, the applicant has a right of appeal to the Board of Trade.<sup>2</sup> Certain types of trade mark are to be treated as 'associated' with others which they resemble so as to be assignable and transmissible only as a group and not separately. If the registrar decides that a trade mark so nearly resembles another owned by the same proprietor that it should be registered as an associated mark and thus remain united with the parent mark, here again an appeal lies to the

<sup>9</sup> Companies Act, 1929, s. 196.

<sup>1</sup> Registration of Business Names Act, 1916, s. 14; and see also, as to the procedure, the Business Names Rules, 1917.

<sup>2</sup> Trade Marks Act, 1938, s. 17.



Board of Trade.<sup>3</sup> The registrar is authorised to correct errors and changes in the name, address and description of a registered proprietor; to cancel an entry in the register; to strike out any goods from those in respect of which the mark is registered; and to enter a disclaimer or memorandum relating to a trade mark which may define the owner's claim and thus enable him to avoid conflict with other business interests. Any decision of the registrar regarding these matters is subject to appeal to the Board of Trade.<sup>4</sup> So, too, where the registered proprietor of a trade mark wishes to add to or alter the mark in a way which does not substantially affect its identity, anyone who is dissatisfied with the registrar's decision can appeal to the Board of Trade.<sup>5</sup> Any application under this provision must be advertised so that opposing parties can raise objections at the hearing. The Board is authorised to make rules empowering the registrar to amend the register in order to adapt the designation in it of the goods or classes of goods in respect of which trade marks are registered to any amended or substituted classification which is prescribed. This means that the registrar may expunge or vary entries, but he may not extend the scope of the goods to which a trade mark applies. The provision is clearly designed to maintain the register in accordance with modern trade usage so far as classification and terminology are concerned. Here again a right of appeal from the registrar's decision lies to the Board of Trade.<sup>6</sup>

In all these instances, the appellant may, if he wishes, appeal to the High Court instead of the Board of Trade. Where the Board is selected as the appellate tribunal it may, if it thinks fit, refer the appeal to the Court instead of dealing with it itself. But where the Board itself acts,

<sup>3</sup> Section 23.

<sup>5</sup> Section 35.

<sup>4</sup> Section 34.

<sup>6</sup> Section 36.

as it normally does, its powers are identical with those of the High Court and its decision is final.<sup>7</sup>

The Trade Marks Act also lays it down that anyone who is aggrieved by the non-insertion in or omission from the register of an entry, or by an entry made without sufficient cause, or by an entry remaining on the register, or by an error or defect in an entry, may apply either to the registrar or to the Court.<sup>8</sup>

The comptroller also possesses a number of judicial powers relating to the registration of designs. He may register any new or original design on the application of the proprietor; and in case of doubt as to the class in which a design should be registered he may decide the question. He can cancel the registration of a design on specified grounds or order the grant of a compulsory licence permitting the use of it, on such terms as he thinks just. An appeal lies to the Court in these matters.<sup>9</sup>

The comptroller may refuse to grant a patent for an invention, or to register a design, of which the use would be, in his opinion, contrary to law or morality.<sup>1</sup> An appeal formerly lay to the Law Officer from a decision of this kind but it now lies to the High Court.

#### THE JUDICIAL FUNCTIONS OF THE HOME SECRETARY

The Home Secretary exercises judicial powers over a number of subjects in the course of discharging his varied administrative duties.

Under the legislation dealing with explosives, a new factory or magazine for gunpowder or other explosives may not be established without a licence, which not only acts as a permit to the owner but also lays down a number of conditions with which he must comply. An applicant for such a licence is required to submit to the Home

<sup>7</sup> Section 53.

<sup>8</sup> Section 32. This is subject to the qualification contained in section 54.

<sup>9</sup> Sections 49 (3) and 58 (2), Patents and Designs Act, 1907.

<sup>1</sup> Section 75; and s. 17 of the Act of 1919.

Secretary a draft of the licence he desires to obtain. This must be accompanied by a scale plan and it must also contain details of the site, buildings, works, processes, output, labour force and other specified matters. If the Home Secretary approves the draft licence, with or without *modifications, he may grant permission to the applicant* to apply to the local authority for their assent to the erection of the factory or magazine on the proposed site. The manufacturer then applies to the local authority for their consent. An elaborate procedure is prescribed in regard to notice and hearing. If the local authority agree, the applicant is entitled to his licence in accordance with the draft approved by the Home Secretary. If the local authority dissent or wish to impose conditions which are not acceptable to the manufacturer, he can appeal to the Home Secretary, who is the final arbiter. The Home Secretary's discretion is at this stage limited in certain respects, for he can refuse the licence only if the local authority dissent. In any other event he may either grant the licence as approved in draft or with subsequent modifications or additions to meet the contentions put forward by the local authority.<sup>2</sup>

The Home Secretary is placed in a curious position here. He has to express an opinion on the original application *to the extent of approving a draft licence*. He is then asked to adjudicate on objections raised by a local authority to that draft licence. It cannot be said that he is judge in his own case; but it is as though a judge of first instance were to act also as the appellate tribunal in the same matter.

Licences are also required for the storage of petrol. Here the application is made in the first instance direct to the local authority. If they refuse to grant a licence, or impose conditions with which the applicant is dissatisfied, he can appeal to the Home Secretary, who may grant the

<sup>2</sup> Explosives Act, 1875, ss. 6-8.

licence either without conditions or subject to those which he thinks proper in the circumstances.<sup>3</sup>

The Home Office is the central department for administering the grants-in-aid to local police authorities; and in consequence of this the Home Secretary has a general responsibility for the efficiency and integrity of the county and borough police forces.

Under the Police (Appeals) Acts, 1927 and 1943, a member of a police force who is punished by dismissal, by being required to resign as an alternative to dismissal, by reduction in rank, or by reduction in rate of pay, may appeal to the Home Secretary. In such an appeal the 'disciplinary authority' which has punished the police officer or constable acts as a respondent. The Home Secretary (unless he decides that the matter can be properly disposed of without taking oral evidence) appoints one or more persons to hold an inquiry and report to him. At least one member of this investigating body must be engaged in or with experience of police administration.

After considering the notice of appeal and other documents submitted by the appellant and the respondent in accordance with the rules made under the Acts, and the report of the fact-finding inquiry, the Home Secretary is required to make an order allowing the appeal, dismissing it, or varying punishment by substituting some other penalty (whether more or less severe) which the disciplinary authority might have awarded. His order is final and binding upon all parties.<sup>4</sup> He can direct an appellant to pay the whole or part of his own costs.

The functions of the Home Office in connection with reformatory and industrial schools are mostly of a regulatory and administrative kind; but in at least one instance

<sup>3</sup> The Petroleum (Consolidation) Act, 1928, ss. 1-3.

<sup>4</sup> Police (Appeals) Act, 1927, s. 2, as amended by s. 1 of the Act of 1943. The Home Secretary is authorised to make rules of procedure for appeals and inquiries under the Act. See S. R. & O., 1943, No. 473, and 1944, No. 913.

the Home Secretary acts in a judicial capacity. This is when a child has been sent to a certified industrial school either because he is refractory or because either of his parents has been sentenced to imprisonment or penal servitude. If the managers of the school cannot agree with the public assistance authority as to the contribution which the latter should make towards the child's maintenance, the matter is to be decided by the Home Secretary.<sup>5</sup>

The coroner is one of the oldest servants of the Crown. Under modern legislation coroners are appointed by county and borough councils, who must notify the Home Secretary both when a vacancy occurs and when it is filled. The coroner receives a salary fixed by agreement between him and the local authority. If at any time an alteration in the salary is proposed and the parties cannot agree on the suggested change, either of them may apply to the Home Secretary, who thereupon is invested with the judicial power to fix the salary at such rate as he thinks proper, having regard to the nature and extent of the duties to be performed and all the circumstances of the case. The rate so fixed takes effect from whatever date the Home Secretary determines and the dispute is thus ended.<sup>6</sup>

A somewhat similar power is possessed by the Home Secretary to determine disagreements between the probation committee (of a probation area) and a local authority liable to pay the expenses of the probation service, on the question of the remuneration which the committee may pay to probation officers, and cognate financial matters.<sup>7</sup>

#### THE JUDICIAL FUNCTIONS OF THE MINISTER OF FUEL AND POWER

The Ministry of Fuel and Power was first created in 1942 on a temporary basis for war-time purposes only. The

<sup>5</sup> Children Act, 1908, s. 74 (11).

<sup>6</sup> Coroners (Amendment) Act, 1926, s. 5.

<sup>7</sup> Criminal Justice Act, 1925, s. 1.

Ministry was later established as a permanent department by statute. Among the functions it inherited were those appertaining to gas and electricity undertakings previously exercised by the Board of Trade.<sup>8</sup> These were more extensive than they had been for many years because in 1941 the Board of Trade took over all the functions of the Minister of Transport in relation to electricity undertakings and the supply of electricity, including those relating to the Electricity Commissioners.<sup>9</sup>

The Minister of Fuel and Power thus came to be charged with the administration of the legislation regulating the gas supply, which involves the exercise of several judicial powers. The Gas Undertakings Acts, 1920 and 1929, authorise gas undertakings to charge for their supplies on the basis of the calorific value of the gas. The Act of 1920 permitted the gas producers to determine the calorific value of the gas which they supply, the consumers paying only for the heat units consumed regardless of the volume of gas in which the undertakers choose to supply those units. A declaration of calorific value by the producer becomes in effect a contract to supply gas of that value, and the due fulfilment of the contract is ensured by the provisions of the Act relating to testing. Under the Act of 1929, statutory undertakers (other than those producing more than a very small quantity of gas in any year), are required to calculate their charges according to the number of therms supplied.

The due fulfilment of these requirements is ensured in the first instance by gas examiners, who are competent and impartial persons to be appointed by the local authority, unless the latter themselves operate a municipal gasworks. On the application of five or more consumers, quarter sessions may appoint a gas examiner for the area,

<sup>8</sup> Ministry of Fuel and Power Act, 1945, s. 1 (2) and First Schedule.

<sup>9</sup> S. R. & O., 1941, No. 2057.

if none has been appointed or if the testing of gas has been imperfectly carried out." One result of this provision is to enable a gas examiner to be appointed by a disinterested body in an area where the local authority owns the gas undertaking.

The gas examiner's duty is to test the gas supplied in his area in the manner prescribed by the Ministry of Fuel and Power, in order to ascertain whether it complies with the statutory standards of calorific value, pressure, purity or composition. If the average calorific value of the gas supplied in an area is found by the Ministry of Fuel and Power from the examiner's reports to be less than the declared calorific value based on the thermal unit, the Department has to determine the sum by which the revenue of the undertakers has been improperly increased, and there are detailed provisions obliging the latter to make restitution to the consumers.<sup>1</sup> The producers may in certain circumstances become liable to forfeitures and other penalties on summary conviction.

Under the Act of 1920 there was a complicated system of appeals to a trio of gas referees and a chief gas examiner, all appointed by the Board of Trade as the central department concerned. Under the 1934 Act these offices were abolished and the appellate powers were conferred directly on the department. The position now is that if any undertakers think themselves aggrieved by the report of a gas examiner they may appeal to the Minister of Fuel and Power who is to appoint a competent and impartial person to determine the appeal. This officer, who, it would seem, may be a member of the Ministry's staff, may confirm, amend or annul the report. He is to consider representations in writing by the parties and on request to give them a hearing. His decision is final and conclusive.<sup>2</sup>

<sup>1</sup> Gas Undertakings Act, 1934, s. 13.

<sup>2</sup> *Ibid.* Second Schedule, Part 3, s. 6

<sup>3</sup> *Ibid.* s. 14.

In regard to electricity supply, any difference between a consumer and an authorised undertaker as to whether an electric meter is or is not in proper order for charging purposes may, if the consumer so desires, be determined by a meter examiner appointed by the Electricity Commissioners and designated to act in the matter. The meter examiner may be an officer or servant of the Commissioners. His decision is final and binding on all parties and he can also direct by which of them the costs are to be paid.<sup>3</sup>

#### THE JUDICIAL FUNCTIONS OF THE ELECTRICITY COMMISSIONERS

The Electricity Commission is a statutory body set up in 1919. The Commissioners are appointed by the Minister of Fuel and Power subject to certain conditions. They were established for promoting, regulating and supervising the supply of electricity. Their powers and duties are conferred upon them directly by Parliament, but subject thereto they are required to act under the general directions of the Minister. He is in turn empowered to exercise through the Commissioners any of his powers and duties under the electricity supply legislation, orders or regulations.

The Commissioners possess extensive judicial powers, particularly under the Electricity (Supply) Acts of 1922 and 1926.<sup>4</sup> Under the earlier legislation, employees of authorised undertakers who were deprived of their employment in consequence of a transfer of the undertaking, or an electrical improvement scheme made under the Act, were entitled to compensation. The Act of 1922 widened the scope of this provision and further provided that any question whether a transfer scheme, agreement or

<sup>3</sup> Electricity Supply (Meters) Act, 1936.

<sup>4</sup> The effect of the Electricity Bill which is at present before Parliament is summarised in the Appendix.



arrangement was made under or in consequence of the Act of 1919 should be determined by the Commissioners.<sup>5</sup>

The Electricity (Supply) Act, 1926, created the Central Electricity Board and introduced very far-reaching changes in the production of electricity. The Board is an operating body while the Commission became more clearly a planning and judicial organ.

The owners of selected generating stations were placed under an obligation to operate their stations under the directions of the Board and to sell to the Board all the electricity generated thereat at a specified price. If any question arises between the Board and the owners concerning their obligations under this enactment it is to be determined by the Electricity Commission unless it relates to the cost of production, in which event it is to be decided by an arbitrator appointed by the Minister of Fuel and Power.<sup>6</sup>

The Board may require authorised undertakers or the owners of selected stations to standardise their frequencies; and large works of this kind were carried out in the development of the electricity grid. The expenses incurred by the undertakers or owners are to be paid to them by the Board. Any question of the amount of such expenditure which it was proper to incur is settled, in default of agreement between the parties, by the Electricity Commission or by an arbitrator appointed by the Minister of Fuel and Power.<sup>7</sup>

All the power generated by the selected stations is acquired by the Central Electricity Board, which is under a statutory obligation to supply the owners with such amount of electricity from the station as they may require for their undertaking. In regard to other authorised undertakers, there are certain conditions which must

<sup>5</sup> Electricity (Supply) Act, 1919, s. 16; Electricity (Supply) Act, 1922, s. 21; and s. 50 and Sixth Schedule of the 1926 Act.

<sup>6</sup> Electricity Supply Act, 1926, s. 7 (6).

<sup>7</sup> *Ibid.* s. 9

be satisfied before the Board may provide them with a supply. In this connection, the Act of 1926 lays it down that where an authorised undertaking has demanded such a supply and the Board consider that the cost of providing the necessary main transmission lines would be unreasonably high, the Board may lay the matter before the Electricity Commissioners, who may, if it seems to them just, authorise the Board to impose whatever terms and conditions the Commissioners think fit.<sup>8</sup>

Where one authorised undertaking, which takes electricity from the Board, supplies another undertaking in bulk, or a railway company for traction purposes, it must charge the same price as it pays itself to the Board, together with certain authorised additions to cover the cost of transmission. Again the Act specifies that if any question arises as to the amount of the price to be charged for resale, the Electricity Commission shall decide it.<sup>9</sup> The owners of selected stations are specially protected in regard to the price which they have to pay the Board, for if they can prove to the Electricity Commissioners that the cost of taking a supply from the Board on the terms laid down by the Act exceeds the cost in any year which they would have incurred if they had remained self-suppliers on a self-sufficient basis, then the Board's charges to those undertakers is to be reduced accordingly to the figure which, in the opinion of the Commission, they would have incurred if they had been left to themselves.<sup>10</sup> Again, a non-selected station may be closed by order of the Electricity Commission if the Board has notified the owners that they can provide them with an adequate supply of electricity at a lower cost and the owners nevertheless refuse or fail to agree to take their supply from

<sup>8</sup> *Ibid.* s. 10 (2).

<sup>9</sup> *Ibid.* s. 12.

<sup>10</sup> *Ibid.* s. 17.

the Board. The Commission must be of opinion that it is expedient to close the station.<sup>1</sup>

#### THE JUDICIAL FUNCTIONS OF THE MINISTER OF TOWN AND COUNTRY PLANNING

In the sphere of town and country planning recent legislation has greatly extended the judicial functions of the relative Minister.<sup>2</sup> The responsible Department is now the Ministry of Town and Country Planning, which has inherited all the planning powers of the Ministry of Health.<sup>3</sup> To these have been added those subsequently conferred by Parliament.

The provisions of the Town and Country Planning Acts relating to interim development give control over development until such time as an approved scheme comes into operation. The Minister is required to make a general interim development order and he may also make special orders for particular areas. An order may itself permit development of land either unconditionally or subject to any specified condition, or it may empower a local authority to permit development in accordance with the terms of the order. Where an application is made to the local planning authority for permission to develop land in the manner provided by the order, they can either grant or withhold permission, as they think fit, and they may give their consent subject to conditions.<sup>4</sup>

An applicant who is aggrieved by the refusal of a local planning authority under these provisions, or who is dissatisfied with any conditions they have imposed, has a right of appeal to the Minister of Town and Country Planning, whose decision is final. The Minister, before

<sup>1</sup> *Ibid.* s. 14.

<sup>2</sup> For the effect of the Town and Country Planning Bill now before Parliament, see Appendix.

<sup>3</sup> I omit for the sake of brevity the intermediate stage when for a short period the Ministry of Works became the department responsible for town and country planning.

<sup>4</sup> Town and Country Planning Act, 1932, s. 10.

deciding the appeal, is, if requested by either side, to afford the parties an opportunity of appearing before and being heard by a person appointed by him for the purpose.

The Minister's power of control over interim development was greatly strengthened by the Town and Country Planning (Interim Development) Act, 1943. If it appears to him to be desirable in the public interest that any particular application for interim development, or any class or description of application, should be referred to him for decision, he can give directions to that effect to the local planning authorities concerned. Here the Minister acts as a tribunal of both first and last instance. Where he acts as an appellate tribunal in respect of these applications he is now authorised to reverse or vary any part of a decision made by the local authority, whether or not the appeal relates to that part. Indeed, he can deal with the whole application as though he were the tribunal of first instance.<sup>5</sup>

New arrangements have been introduced to deal with applications for permission to develop by statutory undertakers—that is, broadly speaking, transport and public utility operators. For the purpose of interim development control, land held by statutory undertakers is divided into (a) operational land and (b) other land. Operational land denotes that which is held for the specialised purposes of the undertaking, such as the marshalling yards or coal depot of a railway or the coal discharging wharves or yards of a power station. Any question whether land falls into the category of operational land is to be determined by the Minister of Town and Country Planning and 'the appropriate Minister'. The latter means the Ministry of Transport for transport undertakings, the Minister of Fuel and Power

<sup>5</sup> Town and Country Planning (Interim Development) Act, 1943, s. 6.

for electric, gas or hydraulic power installations, and the Minister of Health for water supply.<sup>6</sup>

Applications for permission to develop operational land are subject to different provisions from other land. So far as procedure is concerned, an appeal lies to the joint decision of the Minister of Town and Country Planning and his colleague, the appropriate Minister.<sup>7</sup> Where the Ministers propose to refuse permission or to grant it subject to conditions, the statutory undertaker can require the decision to be embodied in a provisional order which takes effect only if confirmed by Parliament.

After a town planning scheme has come into force the planning authority can at any time make a general development order. This becomes part of the machinery for controlling development of an area in accordance with the scheme. The order requires the approval of the Minister, who may modify it.

Where a scheme prohibits or restricts building operations until a general development order has been made, anyone who wishes to contravene the temporary prohibitions or restrictions may apply for the consent of the authority. If the proposed operations would contravene any of the permanent provisions of the scheme, the responsible authority is bound to reject the application. Otherwise, the planning authority may not refuse consent unless they are satisfied that other suitable land is available on reasonable terms and that it would either be premature and excessively expensive to provide the necessary roads and public services or that the operations would seriously injure local amenities. From a refusal the would-be developer can appeal to the Minister, whose decision is final.<sup>8</sup>

The legislation contains provisions intended to afford protection to buildings of 'special architectural or historic

<sup>6</sup> Town and Country Planning Act, 1944, s. 34.

<sup>8</sup> Town and Country Planning Act, 1932, s. 16.

<sup>7</sup> *Ibid.* s. 35.

interest ' by enabling the local authority to prohibit their demolition, alteration or extension, without consent. An order of this kind requires ministerial approval, and so, too, does its variation or revocation. The Minister must, before giving his approval, consider the owner's views and consult the Minister of Works. Where the owner has unsuccessfully tried to persuade the local authority to vary or revoke an order, or to consent to the demolition of the building, he can appeal to the Minister. The Minister's decision is final, but here again he must consult the Minister of Works.<sup>9</sup>

County councils were authorised in certain circumstances to participate in planning for the first time by the Act of 1932, although they were not made the primary bodies for this function. A county council can contribute towards the expenses of other local authorities or a joint committee in preparing or carrying out a scheme and can charge the contribution to either general county purposes or special county purposes. The former has the effect of spreading the cost over the entire county; the latter confines the burden of payment to a specified part of the county. Where a county council decides to defray the cost of its contribution out of general county expenses, any county district within the administrative county may appeal to the Minister of Town and Country Planning.<sup>1</sup>

An interesting feature of the town planning legislation is a provision whereby when an appeal lies, or an application may be made, to a court of summary jurisdiction, the parties may agree instead that the matter in dispute shall be determined by the Minister. It is thus left to the disputants to invest the Minister with the contingent judicial powers which Parliament has authorised him to exercise under these conditions. On the

<sup>9</sup> *Ibid.* s. 17; 1941, s. 43.

<sup>1</sup> Town and Country Planning Act, 1932, s. 49.

other hand, where the Minister is designated by statute to be the tribunal, the parties may, if they wish, submit the matter instead to an agreed arbitrator or, in default of agreement, to one appointed by the Minister. It is worth noticing that the statute does not permit the parties to lay their dispute before the courts instead of the Minister, where he is the designated tribunal.<sup>2</sup>

These provisions apply, not only to questions and appeals arising under the Act, but also to those which arise in connection with any scheme made under the Act.

The Act of 1932 laid it down that where a planning scheme enables the responsible authority to regulate the design or external appearance of buildings, it must also give anyone aggrieved by a decision of this character a right of appeal to a court of summary jurisdiction or to a special tribunal to be constituted for the purpose.<sup>3</sup> The Town and Country Planning Act, 1944, permits a scheme to give a right of appeal to the Minister instead of to these other judicial organs.<sup>4</sup>

The Minister possesses many other judicial powers. For example, he is to hear appeals against interim preservation orders made for the protection of trees and woodlands.<sup>5</sup> It is unnecessary, however, to attempt an exhaustive description of his adjudicatory functions. Enough has been said to show that the Minister of Town and Country Planning acts as an administrative tribunal in regard to a wide variety of disputes and appeals of great importance, both to individual property owners and to the community.

Before we leave this subject mention may be made to the provision in the principal Act which permits a town and country planning scheme to secure in the interests of amenity the preservation of single trees and groups of trees, and in addition the protection of woodland areas.

<sup>2</sup> Section 40.

<sup>3</sup> Section 12 (1).

<sup>4</sup> Section 44.

<sup>5</sup> Town and Country Planning (Interim Development) Act, 1943, s. 8.

The owner of a protected woodland may have imposed on him the obligation, if any part of the timber is felled, to undertake 'such replanting as would be in accordance with the practice of good forestry'. Any question arising between the responsible authority and the owner whether a particular kind of replanting which has been carried out, or proposed, is in accord with the canons of good forestry shall, on the application of either party, be determined by the Forestry Commissioners, whose decision is final.<sup>6</sup>

#### THE JUDICIAL FUNCTIONS OF THE MINISTER OF EDUCATION

The Board of Education, predecessor to the present Ministry of Education, was entrusted with many powers of a judicial nature. It had to decide whether a school was or was not necessary, and this applied to both existing and proposed schools. Thus, if a local education authority gave notice of its intention to provide a new public elementary school, an appeal could be made to the Board by specified classes of objectors, and the Board then had power to decide whether the new school should or should not be erected.

The Board also exercised powers to decide almost any 'question' which arose between a local education authority, on the one hand, and the managers of the denominational or non-provided schools, on the other. This jurisdiction was exercised over a great diversity of topics, including controversies over the appointment and dismissal, remuneration and educational qualifications<sup>7</sup> of teachers; the use of accommodation by the local education authority in the denominational schools; the expense involved in administering a non-provided school,

<sup>6</sup> Town and Country Planning Act, 1932, s. 16.

<sup>7</sup> *Crocker v. Plymouth Corporation*, [1906] 1 K.B. 491.



and even such details as the wages which should be paid to a cleaner.

The jurisdiction of the Board of Education was not limited merely to the determination of disputes arising between the managers of denominational schools and local education authorities. Under the Education Act, 1921, it extended also to many other matters, such as disputes over the granting of licences to permit children to take part in public performances; over the amount which was payable in respect of a child living in a charitable institution; over the question whether the purposes which a local education wished to carry out were purposes relating to elementary or higher education; and many other questions.

The Education Act, 1944, which created the Ministry of Education in place of the old Board, introduced radical changes in the educational system and the administrative organisation on which it is based. The duties and powers of both central and local authorities were enlarged and transformed. The Minister was given a comprehensive power of supervision over the standards of educational provision and a much greater degree of general control over educational development and administration than the Board possessed. The schools provided by religious denominations, to be known henceforth as voluntary schools, could become either controlled or aided, according to the state of their finances. In either event they were in large measure integrated in the system of municipal education, though retaining the right to give denominational teaching by teachers of a particular faith.

The Minister's judicial powers under the Act of 1944 are expressed in general terms.\* Except where some other method is expressly provided, any dispute between a local education authority and the managers or governors

\* Education Act, 1944, s. 67.

of any school regarding the exercise of any power conferred or the performance of any duty imposed by the Act may be referred to the Minister, and he is to determine a dispute so referred. The right to submit a dispute of this kind is not to be impeded by any enactment which renders the exercise of the power or the performance of the duty contingent upon the opinion of the authority or of the managers or governors. In other words, although Parliament may in earlier legislation have conferred a discretion on the local education authority or the school managers, either in regard to the finding of facts or to the action to be taken in consequence of any facts so found, the possession of that discretionary power by either party to the dispute is not to prevent the Minister from exercising an over-riding power of determination.

The jurisdiction thus conferred is far wider than the corresponding powers in the Education Act, 1921,<sup>9</sup> for the latter was confined to questions arising between local education authorities and the managers of 'non-provided' schools, whereas today the Minister can decide a dispute affecting any type of school, including direct grant schools, public schools and independent schools, as well as county and voluntary schools of every kind.

A further provision<sup>1</sup> requires the Minister to determine disputes between two or more local education authorities as to which of them is responsible for the provision of education for any pupil, or whether contributions are payable by one local education authority to another. Here the submission of an unsettled question to the Minister for his decision is compulsory and not permissive. Again, if a question arises whether any alterations to the school premises of a county school or a voluntary school would amount to the establishment of a new school, it is to be determined by the Minister.<sup>2</sup>

<sup>9</sup> Section 29.

<sup>2</sup> Section 67 (4).

<sup>1</sup> Education Act, 1944, s. 67 (2).

parent does not satisfy the authority the latter can then issue a school attendance order requiring the child to become a registered pupil at a school named in the order. If while the order is in force the child's parent applies to the local education authority requesting that another school be substituted for the one named in the order, or that the order be revoked on the ground that other suitable arrangements have been made for the child's education, the authority is obliged to amend or revoke the order unless they consider the proposed change of school is unreasonable or inexpedient in the child's interests, or that the alternative arrangements proposed are not satisfactory. If the parent is aggrieved by a refusal of the local education authority to comply with his or her request, he (or she) can appeal to the Minister, who shall give such direction as he thinks fit.<sup>5</sup> In view of the serious criminal penalties to which parents are liable for non-compliance with school attendance orders, the Minister's jurisdiction in this sphere is of great potential importance. A somewhat similar power is conferred in regard to compulsory attendance at special schools. The statute provides that a child who is a registered pupil at a special school shall not be withdrawn without the consent of the local education authority, but if the parent is aggrieved by the authority's refusal to consent to the child's withdrawal he may refer the question to the Minister for decision.<sup>6</sup>

The legislation dealing with the superannuation of teachers is another sphere in which the Ministry of Education exercises many judicial powers. The earliest statutes of 1898 and 1918 gave no absolute right to superannuation allowance or gratuity. Awards were in theory discretionary, though in practice they could be relied

<sup>5</sup> *See* (1).

<sup>6</sup> Section 35 (2). *See also* the Minister's powers in regard to attendance at county colleges in accordance with college attendance notices: s. 44 (8).

upon with certainty. The Teachers (Superannuation) Act, 1925, which has now largely replaced these almost obsolete Acts, conferred on teachers for the first time a legal right to allowances and gratuities. The whole machinery of these Acts is under the control of the Ministry of Education. As the Board of Education themselves declared to the Committee on Ministers' Powers, 'subject to specified exceptions where the Treasury are concerned, everything to be done under the Act is to be decided by the Board in accordance with its provisions, whether the particular provision involved expressly confers on the Board the power of decision or not'.<sup>7</sup> In view of this sweeping statement, it is not surprising to find a provision to the effect that any question which may arise concerning an application for superannuation allowance or gratuity is to be decided by the Minister of Education, whose decision shall be final.<sup>8</sup> The department is also authorised to refuse, grant at a reduced rate, reduce or suspend the allowance or gratuity of a teacher who has been guilty of such misconduct as, in the Minister's opinion, has or would have rendered him unfit to remain in service as a teacher. The Minister can grant an allowance or gratuity at a reduced rate where he considers that the defaults or demerits of the teacher justify a reduction.<sup>9</sup>

Questions of misconduct are in all conscience hard enough to decide, especially when the forfeiture of a pension is at stake, with all the misery and disappointment which that may entail. Yet in dealing with misconduct every tribunal has at least a large body of case law and tradition to serve as a guide. But 'default' and 'demerit': what do they mean? Who has not defaults or demerits? Certainly not any civil servant

<sup>7</sup> *Evidence*, Vol. 1, p. 19.

<sup>8</sup> Teachers (Superannuation) Act, 1925, s. 16, and First Schedule.

<sup>9</sup> *Ibid.* s. 10.

who will determine a claim under the section on behalf of the Minister, nor any lawyer who may criticise the Minister for possessing such powers. The moral to be drawn from this twenty-year-old enactment, which so far as we know has not given rise to injustice or controversy, is that the question of selecting the proper tribunal for adjudicating matters of public interest is distinct from the specific powers which should be conferred on the tribunal.

Under the Children and Young Persons Act, 1938, a child is not permitted to take part in any entertainment for which a charge for admission is made without a licence. The licence is granted by the local authority, who are required to see that certain conditions are observed in regard to the child's health and kind treatment before they can grant a licence. These arrangements are enforced by a criminal sanction. The legislation enacts that if an applicant for, or holder of, a licence feels aggrieved by the local authority's decision he can appeal to the Ministry of Education, who may thereupon exercise any of the powers conferred on the local authority in this connection.<sup>1</sup>

#### INDEPENDENT SCHOOLS TRIBUNALS

Before leaving the subject of education we may notice an interesting feature of the Education Act, 1944, relating to independent schools. This expression refers to any school containing five or more pupils of compulsory school age which is not maintained by a local education authority or in receipt of grants by the Minister. It thus includes all the private preparatory schools as well as the so-called public schools.

For the first time independent schools will be subjected to a perceptible degree of supervision by the central department. They are to be registered by a registrar,

<sup>1</sup> Section 23

who will be appointed by the Minister from among his officers. It is a criminal offence to conduct an independent school which is not registered.<sup>2</sup>

If the Minister is at any time satisfied that a school on the register is objectionable on the ground that the premises are unsuitable, or that the accommodation is inadequate, or that the instruction is not efficient and suitable for the pupils, or that the proprietor or any teacher is not a proper person to occupy his position, he is to serve a notice of complaint on the proprietor containing full particulars of the matters complained of. Unless the Minister considers the defects to be irremediable, he is to specify the steps to be taken by the proprietor to put matters right.<sup>3</sup>

A right of appeal is given to the proprietor, and to any teacher to whom the Minister objects, to refer the complaint to an independent schools tribunal. This tribunal will be constituted from two panels: a legal panel, appointed by the Lord Chancellor, from which the chairman will be selected, and an educational panel, appointed by the Lord President of the Council, consisting of persons with experience in teaching or in the conduct, management or administration of schools. Two members will be drawn from this panel. The chairman and other members of each independent schools tribunal are to consist of impartial persons appointed from the panels by the Lord Chancellor and the Lord President respectively.<sup>4</sup>

The tribunal, after hearing the parties and considering the evidence tendered by them, will either annul the complaint; or order the school to be struck off the register, either unconditionally or unless measures specified in the notice of complaint are complied with, in their original or a modified form, to the satisfaction of the

<sup>2</sup> Section 70.

<sup>3</sup> Section 71.

<sup>4</sup> Sixth Schedule

Minister; or the tribunal may disqualify the whole or part of the premises from being used as a school; or they may limit the number of pupils to be taken by the school; or they may disqualify the proprietor or a teacher from continuing to act in either of those capacities in any school.<sup>5</sup>

If the proprietor of a school does not refer the complaint to an independent schools tribunal, the Minister can make any order which the tribunal could have made if the matter had been referred to them.

The order of the Minister or of the tribunal is subject to enforcement by criminal sanctions. The Minister is authorised, where he is satisfied on the application of any person, that by reason of a change of circumstances a disqualification imposed either by his own order or that of a tribunal is no longer necessary, to remove the disqualification. An appeal against his refusal lies to an independent schools tribunal.

#### TRIBUNALS FOR UNEMPLOYMENT INSURANCE

The Unemployment Insurance scheme is based on occupation, that is to say, a person comes within the operation of the scheme by reason of the fact that he or she is employed under a contract of employment. The system is at present administered on an agency basis by the Minister of Labour and National Service on behalf of the Minister of National Insurance. The Minister is given power (in terms closely resembling those conferring similar powers on the Minister of Health in connection with Health Insurance) to decide any question which arises whether a particular employment is such as to make a person engaged therein liable to become insured under the Act; who is the employer of an employed person (often a difficult matter to determine); the rates of contribution payable by or

<sup>5</sup> Section 72

in respect of employed persons, and other cognate matters." An appeal from the Minister lies to a single judge of the High Court nominated by the Lord Chancellor for the purpose, and his decision is final. The right of appeal here, it is to be noted, differs from that conferred in the case of similar matters connected with Health Insurance in that it is not limited to questions of law alone, but lies also, apparently, on questions of fact. The Minister may, if he thinks fit, himself refer the question for decision to the High Court, and he is in all cases entitled to appear and be heard. Government departments are no longer in the habit of following the rule laid down by the Victorian age for good children, whose duty it was to be seen and not heard.

The questions arising in connection with unemployment insurance which are most important in the aggregate, though often trifling in the individual instance, are those relating to claims for unemployment benefit, and it is interesting to observe the machinery which has been set up for determining these claims without recourse being made to the ordinary courts of law.

There are three authorities concerned in the matter: first, the insurance officer, an official appointed by the Minister of Labour and National Service<sup>6</sup> (in practice every local employment exchange has at least one insurance officer on its staff); second, the Court of Referees, consisting of one or more members chosen to represent employers, an equal number of members chosen to represent the workpeople,<sup>7</sup> and a chairman appointed by the Minister; and third, an umpire and deputy umpires appointed by the Crown (presumably on the recommendation of the Minister of Labour with the concurrence of the Lord Chancellor).

<sup>6</sup> Unemployment Insurance Act, 1935, s. 1, 12.

<sup>7</sup> Unemployment Insurance Act, 1935, s. 10-2.

<sup>8</sup> The representatives of employers and workers are selected usually from persons recommended by local Advisory Committees.



After thirty-five years' experience, the structure of the courts remains unchanged, although their powers, which were at first only advisory, have become determinative. In practice, each court consists of three members: one to represent the insured workers, one to represent employers, and an independent chairman to represent the State or the general public. Each of these three parties has both a financial and a social interest in the just and efficient administration of the Unemployment Insurance scheme. The courts sit at the employment exchanges, the frequency of the sessions depending on the volume of work requiring to be performed.

The chairman is generally a member of the legal profession, but he is required to be qualified to deal in a knowledgeable way with social and industrial questions. He receives a fee for each sitting, while the other members of the court are unpaid, though they may claim compensation for loss of earnings caused by attendance at the court. Most of the male workers' representatives on the courts consist of trade union officials; this is not equally true of the women's representatives. Wherever possible, women members sit when women's cases are under consideration, and vice versa, apart from the chairman, who may be either a man or a woman.

All claims for unemployment benefit, and all questions whether the statutory conditions are fulfilled in the case of any person claiming benefit, are to be determined in the first instance by one of the insurance officers mentioned above.

In any case where benefit is refused or stopped, or reduced below the amount claimed, the worker may (within a specified period) appeal from the insurance officer to the court of referees. The court, after considering the circumstances, then give a decision which is carried into effect by the insurance officer. The insurance officer

may, if he desires, refer a claim in the first instance to the court of referees instead of himself deciding it.

The insurance officer may not himself disallow a claim on the ground that the claimant is not capable of or available for work; or that that he is disqualified for receiving benefit by reason of having lost his employment through misconduct or by voluntarily leaving it without just cause. Nor may the insurance officer disallow claims on the ground that the applicant has refused or failed to apply for work. These and a number of other types of cases must be referred for decision in the first instance by the court of referees.

The courts of referees deal with an enormous number of cases<sup>1</sup> involving a wide range of industrial and social factors. The following are among the commonest types of question to be determined.

The question of whether a claimant fulfils the statutory condition of being 'capable of and available for work'. The question of capability refers to the claimant's physique and health. The question of availability is of wider import. It may include questions of the hours or days during which the claimant is willing to work; the distance from home he is willing to travel; the type of employment he is willing to accept. A person is not available if he is only willing to take employment for which he is not properly qualified or on conditions which no employer would be likely to accept.

A claimant who voluntarily leaves his employment without just cause is liable to be disqualified from receiving benefit for a period not exceeding six weeks. The question of what is just cause may involve a

<sup>1</sup> The last year for which figures are available is 1938, when approximately 500,000 cases were dealt with. Of these, 462,204 were referred for decision in the first instance to the Courts of Referees, and 37,823 were referred by way of appeal from disallowances imposed by the insurance officers. Of the former, 111,860 claims were allowed and 350,344 disallowed; of the latter, 8,587 were allowed and 29,236 disallowed. *Ministry of Labour Annual Report, 1938 Appendix XXIII, H.M.S.O.*

consideration of wages, hours, conditions of work, the suitability of the employment, the behaviour of the employer or of other employees and the domestic responsibilities of the claimant.

Disqualification will also arise where a worker is dismissed for misconduct. This, again, is a matter which is not susceptible of simple definition, but may touch on many aspects of industrial or commercial life. Breach of the factory rules, dishonesty, insubordination, insolence, persistent unpunctuality, negligent work, disregard of the employer's interests, misbehaviour towards a fellow-employee, refusal to obey an order—any of these may constitute misconduct in certain circumstances.

Another type of disqualification occurs where the claimant has without good cause refused or failed to apply for, or to accept an offer of, a suitable situation which has been notified to him by an employment exchange or other recognised agency, or by or on behalf of an employer; or where a claimant is proved to have neglected to avail himself of a reasonable opportunity of suitable employment. The word 'suitable' is crucial and gives rise to thorny problems touching many aspects of industrial and domestic life, and so, too, does the term 'good cause'.

An entirely different class of case concerns claims for dependant's benefit. The Unemployment Insurance scheme provides for dependant's benefit to be paid to wives, mistresses, parents, housekeepers, sisters, brothers, children and other relatives, subject to specified conditions being satisfied. The commonest is that the claimant must be wholly or mainly maintaining the dependant. This requirement gives rise to many complicated inquiries into family income, income per head, and the respective contributions to the family fund made by each member of the household, before the court can be satisfied that dependency exists.

The anomalies regulations present the courts of referees with some extremely elaborate problems. These regulations were designed to impose special and more onerous conditions on married women, seasonal workers and certain other categories of insured contributors. Under the regulations a married woman must satisfy the court that she will normally seek to obtain her livelihood by means of insurable employment; and that, 'having regard to all the circumstances of her case, and particularly to her industrial experience and the industrial circumstances of the district in which she resides, either (a) she can reasonably expect to obtain insurable employment; or (b) her expectation of obtaining insurable employment is not less than it would otherwise be by reason of the fact that she is married'.

The number and complexity of the factors to be taken into account in determining such cases are self-evident. Still more difficult are the cases falling under the trade dispute disqualification, which disbars from the receipt of benefit workpeople who have lost their employment by reason of a stoppage of work due to a trade dispute at the premises where they were employed. The disqualification is itself subject to various exceptions, which include, for example, a workman who proves that he is not participating in or financing or directly interested in the trade dispute which caused the stoppage of work.

These and similar questions impose on the courts of referees the task of finding a large number of facts and exercising a far-reaching discretion in giving decisions on the facts so found. The jurisdiction of the tribunal does not cover the exceptional and bizarre eccentricities of human conduct, which occupy so much of the time of the civil and criminal law courts, but embraces rather the frequent occurrences which constitute a typical cross-section of the everyday lives of millions of wage earners. Indeed, the extraordinary interest afforded by the work

of the courts of referees lies in the fact that they are dealing with common-place matters affecting the lives of ordinary men and women.

This work is carried on in an atmosphere of informality and simplicity. It is, however, in no sense slapdash. On the contrary, great care is taken to provide the members of the court with typewritten statements containing the relevant information relating to the question to be determined. This includes, not only numerous facts concerning the claimant, but also written statements made, for example, by an employer as to why the employment terminated, with the employee's reply thereto.

The claimant is summoned to attend the sitting of the court, and if he desires he may be represented by an official of his trade union or by a friend—but not by a solicitor or barrister. The members of the court question the claimant and any witnesses he may bring, and also the employer if he is present—which he rarely is. The claimant and witnesses then retire to enable the court to discuss the case in private.

Above the courts of referees is the umpire, a superior tribunal whose decisions are final. A right of appeal to the umpire lies: (1) at the instance of the insurance officer; (2) at the instance of a trade union of which the claimant was a member when last employed; (3) at the instance of the claimant in any case in which the decision of the court of referees is not unanimous, or in any other case with the leave of the chairman.

In practice, only a very small fraction of the enormous number of cases which are decided by the courts of referees go to appeal, and the work of the courts therefore enjoys a high degree of finality.<sup>2</sup> Nevertheless, even that

<sup>2</sup> In 1938 the Umpire gave 5,000 decisions. This was 1 per cent. of the cases coming before the Courts of Referees. *Ministry of Labour Annual Report*.

small fraction was sufficiently large, prior to the outbreak of war, to engage the full-time attention of the umpire and four deputy-umpires.

Here, it is to be observed, is an elaborate system of co-ordinated tribunals charged with the statutory task of determining intricate questions of fact and difficult points of law in connection with questions which may affect the lives of millions of workers and their families. The whole of this adjudicating machinery is placed outside the ordinary judicial system of the country; its conclusions are final, and neither party can appeal to the courts of law.

The tribunals vary greatly as to their constitution. The insurance officer is an ordinary civil servant subject to the normal conditions of service and discipline prevailing in the civil service. Then there is the court of referees, with its frank avowal of representative bias counteracted theoretically by an independent chairman holding the balance impartially between conflicting sympathies and guiding the proceedings with a trained legal mind. He is the representative of the public interest in the business of the tribunal. Finally, there is the umpire, who by custom is impartial, by training a lawyer, by tenure of office and method of appointment an independent public officer, by tradition a person endowed with the judicial mind. He is assisted by several deputy umpires. The machinery of adjudication thus attempts to combine all the interests nearly concerned in the proper administration of unemployment insurance: the central government department, the employers, the insured work-people and the general public at large. The umpire, who is a trained lawyer representing nobody in particular, and whose position has been denoted by a title used nowadays almost exclusively to signify a man whose job it is to see that cricket is played fairly according to the rules of the game, is the final authority in matters under dispute. It

is assumed that he will embody the impartial attitude manifested by judges in the courts; but the other two tribunals are frankly not independent; and in particular they are subject, potentially at any rate, to a very considerable control by the Minister of Labour and National Service, who exercises the power of appointing the insurance officer in the one case and the members of the court of referees in the other and of terminating their appointments. Even after they have been appointed the chairman and other members of the courts of referees attend sittings only on the express invitation on each occasion of the department, who can simply 'drop' a member without giving any explanation for so doing.

#### TRIBUNALS FOR UNEMPLOYMENT ASSISTANCE

The Unemployment Act, 1934, which was based on the report of the Royal Commission on Unemployment Insurance, provided a new form of public aid called unemployment assistance for unemployed persons who had exhausted their rights to unemployment insurance benefit. Neither Parliament nor the Government were willing, for political and moral reasons, to see this class of persons driven to seek public assistance.

The Unemployment Assistance Board (as it was then called)<sup>3</sup> was set up to administer the new service. Part II of the Act authorises the Board to grant unemployment allowances to persons to whom that part of the Act applies who are in need of work. It declares the Board's functions to be the promotion of their welfare and, in particular, improvement and re-establishment of their condition with a view to fitting them for regular employment.<sup>4</sup>

Part II of the Act applies to persons who, broadly speaking, satisfy certain defined conditions of age and occupation, and who are capable of and available for

<sup>3</sup> The word 'Unemployment' in the title was later dropped

<sup>4</sup> Sect. 23

work. The question whether any individual falls into this category is to be decided in the first instance by an officer of the Board, from whose decision an appeal lies to one of the appeal tribunals established by the Act. The appeal can be brought either by an applicant for an allowance or by a public assistance authority. The latter is an interested party in that men and women who fail to obtain unemployment assistance would normally fall back on public assistance.

An appeal tribunal consists of a chairman and two other members. The chairman is appointed by the Minister of Labour and National Service. One of the other members is selected and appointed by the Assistance Board from a panel nominated by the Minister to represent workpeople. The remaining member is appointed by the Board to be their own representative. The Board assign to each tribunal the district in which it is to sit. They provide a staff of clerks and other officers; they determine (after consultation with the Minister and with Treasury consent) the remuneration, expenses and allowances for the members of the tribunal; and make rules as to their tenure of office. They also regulate the tribunal's procedure by means of such rules.<sup>1</sup>

Applications for allowances are made in the first instance to the Board, whose officers determine all claims and questions. An applicant who is aggrieved by an official decision may appeal to an appeal tribunal, whose determination is final. The tribunal can either confirm the officer's decision or substitute any decision which he was empowered to make.<sup>2</sup>

#### PENSIONS TRIBUNALS

The administration of almost any scheme of pensions necessarily involves a large number of disputed claims,

<sup>1</sup> Seventh Schedule.

<sup>2</sup> Section 30.



and it is interesting to observe the methods which have been adopted for settling controversies of this kind in the various national Old Age, Widows', Orphans', and War Pension schemes in England. Under the Old Age Pensions Act, 1936, which consolidates the earlier legislation relating to non-contributory pensions, all claims for pension and all questions whether a person is qualified in law to receive a pension are to stand referred to the local pension committees which were set up throughout the country; and a committee must obtain a report from the local pension officer, an official appointed by the Treasury, and then give their decision on the claim. From the decision of a local pension committee an appeal lies, at the instance of the pension officer or any person aggrieved, to the central pension authority, which was at first the Local Government Board, later the Ministry of Health and now the Ministry of National Insurance; and the decision of that department is final and conclusive.<sup>3</sup> If there is no appeal the decision of the local pension committee is binding. These arrangements date from the first Old Age Pension Act of 1908, and were never substantially changed.

When the war of 1914-18 produced a vast host of disabled soldiers, and the dependants of those soldiers who had been killed, to whom pensions had to be paid, the machinery of adjudication provided by the War Pensions Acts for the settlement of disputed claims consisted similarly of a series of administrative tribunals of one kind or another. Thus, the local War Pensions Committees (which had a large amount of purely administrative work) had also to hear complaints made by persons receiving or claiming pension, and to inquire into any matter referred to them by the Minister of Pensions and to make recommendations to the Minister.<sup>4</sup> There

<sup>3</sup> Old Age Pensions Act, 1936, ss. 6, 9.

<sup>4</sup> War Pensions Act 1921, s. 2.

was an appeal allowed in these and many other cases, where a final award had been made<sup>5</sup> or a claim rejected on certain specified grounds, to a Pensions Appeal Tribunal, whose decision is final and conclusive. These appeal tribunals were constituted by the Lord Chancellor, and consisted of three persons; a lawyer, a disabled officer or man, and a medical practitioner.<sup>6</sup> A similar system has been imposed by recent legislation to deal with pension appeals arising out of the Second World War.<sup>7</sup>

An entirely different method of adjudication was introduced in connection with the scheme of Widows', Orphans' and Contributory Old Age Pensions which was started in 1925. Here the enabling statute provides that all claims for pension must be made direct to the Minister of Health (now replaced by the Minister of National Insurance) who makes a decision. If the claimant is dissatisfied with the award of the Minister, the controversy is referred to referees selected from a panel of referees; and their decision is final and conclusive.<sup>8</sup>

A claim for pension may at first sight appear to form a special class of dispute, not comparable with a controversy of the sort which courts of law determine. But this is not really the case. A claimant for pension is endeavouring to assert certain rights with which he alleges himself to have been endowed, and it is immaterial whether those rights accrue by virtue of membership of an association, employment in a firm, contract, public service, or social provision made by the community in respect of disability, old age and so forth, and clothed in statutory form. When the claim is opposed, or rejected, the dispute crystallises into a *lis inter partes*, and there is no necessary and inherent reason why it should be disposed of by an administrative tribunal

<sup>5</sup> *Ibid.*

<sup>6</sup> War Pensions Act, 1919, s. 8.

<sup>7</sup> Pensions Appeal Tribunals Act, 1943.

<sup>8</sup> Widows', Orphans', and Old Age Contributory Pensions Act, 1925, s. 29.

rather than by the courts, apart from questions of social expediency. We say this in order to guard against the assumption which is often made that it is somehow 'natural' for the judicial functions ancillary to a State pension scheme to be undertaken by administrative tribunals.

#### THE NEW NATIONAL INSURANCE SCHEME

The haphazard development of the several schemes of social insurance and assistance which have gradually evolved during the past thirty or forty years has produced a series of unco-ordinated tribunals exercising a variety of judicial powers. The methods of adjudication adopted in connection with health insurance, unemployment insurance, widows', orphans' and contributory old age pensions, the non-contributory old age pensions and unemployment assistance, disclose no common principles regarding either the choice of the tribunal, its constitution, the powers conferred upon it, the procedure it is required to follow, or the facilities for appeal. It is impossible to distinguish on logical or sociological grounds between the judicial functions which have been allocated to individual Ministers, to the courts of referees and the umpire, to individual referees or to local committees.

No attempt appears to have been made either by Parliament or by governmental inquiry to investigate the respective merits of the various methods in use or to introduce any measure of uniformity or consistency. Only the unemployment insurance tribunals have been subjected to repeated inquiry by official committees and commissions, to which I shall refer shortly.

The unification of the whole fabric of social insurance, its extension and improvement in every direction, and the establishment of a separate Ministry to be responsible for its administration, which took place in consequence of the Beveridge Report, compelled attention to this problem.

We may therefore consider the provisions of the National Insurance Act, 1946, respecting the determination of claims and questions.

The Act indicates only in very general terms the policy which Parliament has decided to adopt in this sphere. It enacts merely that 'regulations may provide for the determination by the Minister, or by a person or tribunal appointed or constituted in accordance with the regulations, of any question arising under or in connection with this Act, including any claim for benefit, and subject to the provisions of the regulations the decision in accordance therewith of any such question shall be final.'<sup>9</sup> The Act then stipulates that the regulations shall not enable the Minister to determine questions touching the right to benefit but shall provide for these to be submitted in the first instance to an officer appointed by the Minister. The regulations must authorise that officer either to decide the question himself or to refer it to a local tribunal, and in the former event enable appeals to be brought from the officer's decisions to such a tribunal; and lastly, the regulations must enable appeals to be brought from a local tribunal to a final authority called the National Insurance Commissioner or his deputy, or to a tribunal presided over by the commissioner or a deputy commissioner. The commissioner and his deputies are to be appointed by the Crown.

The statute excludes from the jurisdiction of these tribunals questions concerning whether the contribution conditions required for any benefit have been satisfied; questions relating to entitlement to a death grant; and those arising from conflicting claims to dependants' benefit.

The statutory regulations may also provide for referring

<sup>9</sup> Section 43. Certain questions which are similar to those which have to be decided under the Family Allowances Act, 1945, are to be determined in like manner as the latter.

to the High Court any question of law arising from the exercise by the Minister of his judicial functions and for appeals to the High Court from the Minister's decision on any question of law.<sup>1</sup> The High Court's decision is to be final in these references or appeals. The regulations are to be laid before Parliament and are to be subject to a negative resolution.

It seems clear from the wording of the Act, and the historical background against which it must be set, that it is the intention of the Minister who framed the Bill and of Parliament, to establish a system of administrative tribunals resembling those which have discharged judicial functions in the field of unemployment insurance with conspicuous success for more than thirty-five years. The triad of adjudicating bodies, consisting of the appointed statutory officer, the local tribunal and the National Insurance Commissioner correspond to the insurance officer, the court of referees and the umpire which operate under the existing Unemployment Insurance Acts. Whether there are to be separate officers and local tribunals appointed for different classes of benefits and claims, is left to be determined by the regulations.

The jurisdiction of these administrative tribunals will be self-contained, for there is to be no appeal to the courts from their decisions on either law or fact. Only the decisions of the Minister on questions of law can be taken to the ordinary courts.

The vast extension in the scope of national insurance, both in regard to the persons covered by the system—which now comprises the entire population—and the variety of benefits provided, will cause an enormous increase in the jurisdiction of the tribunals and the volume of business going before them for decision. The new Act demonstrates in a marked degree the confidence of the legislature and the public not only in the new methods of

<sup>1</sup> Section 13 (4)

administrative justice but also in the ability of the Minister of National Insurance to create the necessary tribunals and to regulate their procedure.<sup>2</sup>

This confidence is no doubt partly due to the views expressed by three official committees or commissions on the work of the courts of referees and associated authorities engaged in determining unemployment insurance claims.

The Blauesburgh Committee on Unemployment Insurance, set up in 1927, declared that 'From all we have learned during our inquiry we believe that courts of referees inspire general confidence'.<sup>3</sup> The significance of this remark was enhanced by the fact that the chairman of the committee was a law lord, who would scarcely be expected to be prejudiced in favour of such new-fangled institutions as the courts of referees, representing as they do a sharp break with the tradition of the ordinary courts.

The Morris Committee was appointed in 1929 to consider 'the constitution and procedure of statutory authorities performing the functions of insurance officers and courts of referees under the Unemployment Insurance Acts, and the nature of the evidence to be required as to the fulfilment of the conditions or the absence of the disqualifications for the receipt of unemployment benefit under the Acts'. The real object of the committee was to inquire into the operation of the then existing statutory condition which required claimants to prove that they were 'genuinely seeking work but unable to obtain suitable employment'. This condition had given rise to much hardship and resentment on the part of the unemployed; and criticism naturally tended to fall on the adjudicating organs which carried out the legal provisions.

The Report of the Morris Committee<sup>4</sup> recommended

<sup>2</sup> See s. 43 (5) as to the Minister's powers in regard to making regulations concerning the procedure to be followed in the determination of claims and questions.

<sup>3</sup> Report of the Unemployment Insurance Committee, 1927 p. 16.

<sup>4</sup> Cmd. 3415 1929

the abolition of the statutory condition and the substitution of an entirely different test of good faith, a reform which was accepted shortly afterwards. So far as the courts of referees were concerned, the committee recommended a number of minor improvements in procedure, and emphasised that chairmen should possess a knowledge of industrial and working-class conditions in addition to having sufficient legal training. The report made no substantial criticism of the tribunals concerned; and, indeed, strengthened their position by proposing that their determinations should henceforth be a decision and not a recommendation.

In 1930 the Royal Commission on Unemployment Insurance, presided over by Judge Holman Gregory, K.C.,<sup>5</sup> observed of the machinery for adjudication of claims to benefit: 'Generally, we find that the machinery is working satisfactorily, and that the courts perform their duties with a full sense of their responsibility'. The Commission had no major alteration to suggest in the general framework of adjudication, but recommended certain changes in detail. The Minority Report agreed with the Majority recommendations, but emphasised the need to define more clearly the functions of the umpire, so as to distinguish the duty of laying down general rules to guide the courts of referees from that of acting as an appeal tribunal on individual cases. They wished the umpire to have power to issue codified rules interpreting the law on general principles, without waiting for a particular case to arise; while the function of acting as a final appeal tribunal should, they thought, be devolved upon divisional umpires sitting in seven great regions.

#### NATIONAL SERVICE TRIBUNALS

A further and more exacting test of the adjudicating bodies set up under the Unemployment Insurance Acts

<sup>5</sup> Final Report. Cmd. 4185 1932, p. 258.

occurred during the second World War, when they were required to discharge a whole series of new and difficult tasks connected with various forms of national service.

In May, 1939, compulsory military training was introduced in this country for the first time during a period of peace by the Military Training Act. Under this Act men between the ages of twenty and twenty-one were liable to be registered for military training, and to be called up for training within one year from the date of registration. Provision was made for the postponement or ante-dating of liability to be called up, to a date subsequent or prior to the normal age limits; and applications for such treatment, if made on grounds of hardship and rejected by the Minister of Labour, were referred to Military Training (Hardship) Committees. These committees consisted of the chairman of a court of referees under the Unemployment Insurance Acts sitting with two other persons selected by the Minister from a panel. The umpire or deputy-umpire, sitting with two assessors, was made the final appellate body.

The National Service Act, passed on the outbreak of war, is a much more drastic law. It authorises the Government to call up every male British subject between eighteen and forty-one years of age for service in the armed forces of the Crown. The Act provides an opportunity for seeking postponement—but not for ante-dating—similar to that afforded by the Training Act, but it is only open to men who can prove that 'exceptional hardship' (as distinct from simple 'hardship' under the Training Act) would ensue if they were called up in the ordinary course. The same machinery of adjudication is used, namely, the Unemployment Insurance Courts acting under the name of Military Service (Hardship) Committees. The application is made in the first instance to the Minister, who may grant it. If he does not grant it he must refer the matter to the committee for decision.



The arrangements for postponement of calling up should not be confused with the machinery for dealing with conscientious objectors, which is quite distinct.<sup>6</sup> The local tribunal for hearing persons claiming to be conscientious objectors consists of a county court judge sitting as chairman with two other members appointed by the Minister of Labour and National Service. The 'other members' are selected for their impartiality, and half their number is appointed after consultation with workers' organisations.

The Military Service (Hardship) Committees were set afloat on an entirely uncharted sea, without compass or map to guide them on their journey. The legislation gives no indication as to the meaning of either hardship or exceptional hardship. But Parliament enacted that the Minister of Labour and National Service should have power to make regulations as to the principles to be applied by the committees, and the circumstances to which regard is and is not to be had, in determining applications for the grant or renewal of postponement certificates, and as to the period for which a postponement certificate may be granted or renewed. This power the Minister exercised shortly after the Act was passed.<sup>7</sup>

The regulations distinguish three kinds of hardship: that arising from domestic circumstances; that arising from business responsibilities and interests; and that arising from 'individual circumstances and other cases'.

As regards the first category, the regulations state that regard should be had to the circumstances in which members of the same household as the applicant or dependent persons living elsewhere than in that household will be placed in the event of postponement being

<sup>6</sup> Nor with the Manpower Boards, which were set up to grant deferment for industrial reasons.

<sup>7</sup> The National Service (Armed Forces) (Postponement Certificates) Regulations, 1939, S. N. O., 1939, No. 1541

refused rather than to the applicant's individual circumstances. A certificate should be granted only if, owing to the existence of specific circumstances, the refusal of it would be likely to cause hardship to the dependants or members of the household 'over and above that which the calling up of men for service in due course might normally be expected to cause'.

The regulations require that an application based on business responsibilities and interests should be granted only if the circumstances are such that the business or occupation cannot be carried on in the applicant's absence unless and until alternative arrangements have been made for its continuance, and the necessary arrangements either for carrying on the business or for its disposal cannot immediately be made.

In respect of the third category of case, which consists of the residue, the regulations require the Hardship Committee to grant postponement only if they are satisfied that, if it were refused, hardship would be caused to the applicant over and above that which the calling up of men for military service in due course might normally be expected to cause.

The maximum period for which a postponement certificate can be issued is six months from the date of application; but this can be renewed indefinitely by the Hardship Committee.

The Minister's regulations are necessarily abstract and general. They are not of great assistance in determining actual cases because they leave so many questions unanswered. The umpire's decisions laying down principles of a more definite character proved of substantial help in at least two important types of cases.

The first relates to students undergoing courses of instruction at universities, technical schools or colleges, or studying for professional or vocational qualifications by other means. The question whether such men should be

postponed was obviously of the utmost importance for their future careers. The umpire originally laid down the following tests to be applied <sup>8</sup>:

- (1) The applicant must be studying in order to become qualified to follow some occupation which he intends to adopt as a means of livelihood, or for the purpose of obtaining a degree, diploma or other similar qualification which has important value to him in his future career.
- (2) The passing of the examination for which he was studying at the date of registration under the National Service (Armed Forces) Act is essential to, or is generally recognised as appropriate to, such qualification.
- (3) That the examination is due to commence within nine months of the date of registration and he has a genuine intention of sitting for it.
- (4) That he has been pursuing a course of whole-time or part-time study for the degree, diploma, etc., for a calendar or academic year preceeding the date of registration.

This decision was substantially amended by subsequent decisions. It is therefore given only for illustrative purposes to show the growth of administrative justice in this particular sphere.

The decision was liberally interpreted so as to include students studying for degrees, certificates, or diplomas in other than the purely vocational subjects or professional faculties. The position of apprentices was assimilated to that of other students.

The second class of case where the umpire's decisions were particularly helpful consists of those in which a man seeks postponement on the ground that his wife is pregnant. Here again the umpire introduced the time

<sup>8</sup> Decisions 1529, 40 (N.S., Cole 2, Pamphlet No. 6, 40).

element as a factor which may guide the committee, though not in any hard-and-fast or mechanical manner. The umpire said, in effect, that there must be some 'specific circumstance' connected with the pregnancy to produce exceptional hardship. While it is impossible to visualise all the 'specific circumstances' which might exist, such a circumstance may arise from the state of health of the expectant mother; or from the arrangements which are contemplated for the confinement; or from the length of time which will elapse before the birth of the child. If the birth of the child is expected in not more than three months from the date of application, this may be a 'specific circumstance' causing exceptional hardship because 'in the last three months of pregnancy a woman's nervous condition is more likely to be upset, so the separation from her husband would cause her greater hardship than in the preceding six months'.<sup>9</sup>

There are innumerable other kinds of cases. There are, for example, applications based on the economic dependency of wives, children, parents and other relatives; and in deciding these the Military Hardship Committees must estimate the financial resources which will be available from service dependants' allowances, from the Assistance Board and other sources, when the applicant's contributions from present earnings are withdrawn. There are cases where crippled or sick relatives are physically dependent on the personal services of the man who is liable to be called up. There are cases where near relatives are dangerously ill, or where the applicant or his family has recently suffered a bereavement and it would add unduly to their distress if he were called up without delay.

The most difficult class of case has usually been that which concerns hardship alleged to arise from 'business

<sup>9</sup> Decision 32 40 (N.S.), Code 2, Pamphlet No. 1 10.

interests and responsibilities'. The owners of one-man businesses nearly always ask for time in which to train a substitute or sell their business or dispose of the stock or liquidate their debts. There appear to be thousands of small hairdressing saloons, boot-repair shops, and so forth, which are run entirely by one man, who falls within this category.

Then there are the family businesses, in which perhaps the most vigorous and active member is liable for military service, and wants time in which to train a relative to take his place. There are small shops whose owner cannot afford to employ a manager or even an assistant, but endeavours at the last moment to train an employee or his wife to run the business.

The businesses in respect of which applications are made are by no means always small ones. Sometimes quite large firms are involved. During the war the proprietor or managers of substantial concerns were usually deferred by the man-power boards who dealt with industrial priorities and requirements.

The difficulty of dealing justly with applications of this type became immensely difficult as the war proceeded. First, because as the age of call-up increased, the recruits comprised middle-aged men occupying much more responsible positions than the youths of twenty and upwards in the earlier groups. Second, the labour shortage became increasingly stringent, so that it was exceedingly difficult or even impossible to engage substitutes, whether experienced or untrained, in many lines of trade. An instance of this was the liquor trade, in which there was an extreme shortage of barmen and cellar-men for public-houses. Many licences are held jointly by husband and wife; and in certain districts it is impracticable for a woman to run a public-house without male help. Yet if a way could not be found to carry on in the husband's absence, the licence and the inventory

would have to have been surrendered at a heavy loss to the holders.

The business of provision merchants and butchers, to take another example, became much more difficult to conduct in consequence of the complicated food regulations and rationing requirements, which involve a great deal of worrying clerical work which is sometimes beyond the competence of someone who would be quite able to take over the practical side of running a shop. Third, with each reduction in the regular personnel of a business, it became increasingly difficult to spare the next man.

Nevertheless, the extent to which those and other difficulties could be overcome depended in large measure on the attitude of the man himself. Some applicants leant back on their problems, maximised their difficulties and made only slight or ineffective efforts to overcome them. When these cases came up for grant or renewal of postponement certificates, the main task of the committee was to distinguish between genuine difficulties and exaggerated excuses which were magnified by the applicant because he was, consciously or unconsciously, reluctant to overcome them.

Where the applicant is not eager to serve in the armed forces, it is sometimes difficult to discover the true facts of the case. For instance, a large number of sons declare that they are the owners of businesses which in fact belong to their fathers, who employ them for a wage. The father is frequently alleged to have become incapable of taking an active part in the management of the business owing to ill-health; and a medical certificate is submitted showing him to be suffering from 'chronic bronchitis' or heart trouble. The fact that a person is suffering from such an ailment is little guide to his effective working capacity for running a small business.

The work of the Military Hardship Committees, like that of the Unemployment Insurance Courts, is conducted

in an atmosphere of informality and with little technicality. The applicant can be represented by a friend if he so desires; but lawyers are not permitted to appear in their professional capacity. He can bring witnesses or written statements to corroborate his evidence. There is no representative of the military authorities or any other adverse interest present to oppose the application.

Strictly speaking, the committees are constituted to perform only judicial functions. Their task is to ascertain if exceptional hardship exists; and, if so, to grant a certificate of postponement. But anyone with an understanding of the organic nature of administrative tribunals will appreciate the complete inadequacy of such a conception.

The Military Hardship Committees have had somehow to contrive to strike a reasonable balance between the military needs of the State and the personal claims of the individual, as reflected in each particular case. They cannot attach conditions to the grant of a certificate of postponement; but they can (and do) state the reasons for their decision which may indicate on a subsequent occasion what the applicant undertook to do if he was given time in which to do it. They can (and do) try to assist applicants by suggesting methods by which domestic and business problems may be solved.

Between 1939 and 1945 it was, above all, essential for a Military Hardship Committee to recognise that its attitude towards an applicant might have an important influence on his attitude towards the war. The three members of the committee who faced the potential recruit in the bare board-room of an employment exchange might well represent to him, at that moment and later in his memory, the State, the Government and the War, all rolled into one in a more or less confused way. The actual decision which was given might sometimes be less important psychologically than the manner in which he

was handled by the committee. No matter how slender the grounds of his application might prove to be, he had to be made to feel that he was receiving careful and courteous consideration—in short, a square deal. Any impression he might get that his personal interests were being dealt with in a perfunctory manner, or ridden over roughshod, might produce lasting resentment with disastrous consequences to his future usefulness as a soldier. A Military Service (Hardship) Committee must always bear in mind that the Army does not need mere men, but willing soldiers. The busy committee member who is anxious to get away by 4 p.m. at all costs must be firmly resisted and reminded of this aspect of the tribunal's work.

The National Service Act, 1941, imposed a liability on men who are already liable for service in the armed forces, to be called up for full-time Civil Defence purposes. The Military Hardship Committees dealt during the war with applications from men called up under this Act for the Civil Defence services.

An important extension of the jurisdiction of the committees was conferred under Defence Regulations 26A and 27B and the various Orders issued under their authority.

The Fire Prevention (Business Premises) Order, 1941,<sup>o</sup> required the occupier of every business premises to which it applied to make proper and adequate arrangements for securing that fires occurring at the premises as the result of hostile attack would be immediately detected and combated. The occupier was to notify in writing the arrangements to the proper authority, who could approve, modify or disapprove the proposals. It was the duty of the occupier to carry out the arrangements as approved by the appropriate authority.

<sup>o</sup> S. R. & O., 1941, No. 69.



When the scheme was approved, all male persons between eighteen and sixty years of age had an obligation to take turns of duty at the premises and perform such fire-prevention duties as were allotted to them in accordance with the arrangements, for a maximum period not exceeding forty-eight hours a month. Certain conditions were laid down concerning the conditions under which fire-watching was to take place; and the Order provided for the exemption of Home Guards, persons engaged on vital work for exceptionally long hours, and other specified categories of men.

The Civil Defence Duties (Compulsory Enrolment) Order, 1941,<sup>1</sup> provided for the compulsory enrolment of men for fire-prevention duties in areas where the Minister of Home Security was satisfied that the number of volunteers was insufficient to enable the local authority to discharge its relative functions under the Defence Regulations, and had in consequence applied the Order thereto. In that case, of course, the duties of fire prevention were not necessarily confined to a particular building or street.

Under both the Orders every man was given the right to apply for exemption from all or any of the duties on the ground that he was medically unfit to perform them or that it would be an exceptional hardship for him to be required to perform them. The Civil Defence Duties (Exemption Tribunals) Order, 1941,<sup>2</sup> made the Military Service (Hardship) Committee for the district the tribunal which heard and determined such applications. Its decision was final and there was no appeal.

Most of the applications which went before the Hardship Committees were based on grounds of medical unfitness. The applicants usually supported their cases with medical certificates from their own doctors, where the unfitness was alleged to arise from health rather than

<sup>1</sup> S. R. & O., 1941, No. 70.

<sup>2</sup> S. R. & O., 1941, No. 163.

from some obvious physical disability. But in order to enable the committee to have independent medical testimony, a report could be obtained from a doctor specially attached to the employment exchange for the purpose. It was by no means an easy task to estimate the degree of health and physique required to carry out fire-prevention duties, especially in places where most of the fit men under thirty-five years of age had been called to the forces.

In course of time the number of applications for exemptions became so large that the Hardship Committees were unable to cope with them. In London alone there were 100,000 cases outstanding on one occasion. In order to relieve the situation, applications based on medical grounds were withdrawn from the Hardship Committees and handed over to the Regional Commissioners, leaving the former with only those cases dealing with exceptional hardship. It was obviously impracticable to allow the Hardship Committees to be overwhelmed by this special category of work, which the Ministry of Labour and National Service had agreed to their performing on behalf of the Ministry of Home Security, to the detriment of their other tasks.

#### LOCAL APPEAL BOARDS

Under the Essential Work Orders certain functions devolved on Local Appeal Boards. Thus, although the employer's common law right to dismiss summarily for simple misconduct was superseded, he retained the right to dismiss for 'serious misconduct'. This was subject to the worker's right of appeal to the Local Appeal Board. A worker who was suspended could also appeal to the Board. The Board was composed in a similar manner to that of the Court of Referees.

The Local Appeal Boards had legally no powers of determination, and their conclusions took the form of

recommendations to the National Service Officer. That officer had a duty to take into consideration any recommendation by the Local Appeal Board; and, if the Board were of opinion that the dismissal was not justified on the ground of serious misconduct, he could either direct the reinstatement of the employee or merely notify the parties of the Board's findings without giving a direction. In practice, the recommendations of the Local Appeal Boards were almost invariably followed in misconduct cases where the Board was unanimous, although an instruction by the Minister of Labour and National Service requiring National Service Officers to order reinstatement in such cases if the workman desired it, was held to be an illegal infringement of the discretion given to the National Service Officers.<sup>3</sup>

In establishments to which an Essential Work Order applied, an employee could not be discharged or leave his job without the permission of the National Service Officer. The largest class of cases going before the Local Appeal Boards consisted of appeals (by an employer or by a worker) against the National Service Officer's consent to release, or refusal to release, a particular individual.

The Boards also exercised many other functions, such as hearing appeals by men who had been directed by the National Service Officer to join the Home Guard, by women who were directed to join the Women's Land Army or to enter nursing, and by men or women who were directed to take up Civil Defence work or to accept war work of an industrial character in any part of the country.

In exercising all these functions the Local Appeal Boards proceeded as though they had determinative powers, and they played an influential part in national

<sup>3</sup> *Simms Motor Units, Ltd. v. Minister of Labour and National Service* (1946), 2 All E.R. 201. See my note on this case in *Modern Law Review*, Vol. 10, p. 70.

service administration. We cannot, however, rank them high among administrative tribunals.

#### REINSTATEMENT TRIBUNALS

From the first introduction of compulsory military training in May, 1939, the employer of a man called to the Forces for this purpose had a legal obligation to reinstate him at the end of his training period. This obligation was continued in the National Service (Armed Forces) Act, 1939, passed on the outbreak of war, which contained much more drastic provisions relating to liability for military service, and also in the far-reaching National Service Act, 1941.

The present law is to be found in the Reinstatement in Civil Employment Act, 1944, which sets out at length the obligation of employers to reinstate former employees; the detailed requirements as to the manner, time and duration of applications for reinstatement; the various priorities to be observed in applying the principles of the Act, and many other aspects of this vitally important process of assisting men and women serving in the Forces to return to their civil employment on demobilisation. We are concerned here, not with the substantive provisions of the statute, but with the machinery of adjudication which it provides.

Once again we find ad hoc administrative tribunals called Reinstatement Committees constituted on the now classic model of the Courts of Referees. There is a chairman selected by the Minister of Labour and National Service from a panel of persons appointed for the purpose; a member selected from an employers' panel and another from an employees' panel. Expert assessors may be attached to Reinstatement Committees to advise them, but they do not vote or take part in the decisions. Above

the Reinstatement Committees are an Umpire and Deputy-Umpires appointed by the Crown. They, too, may have assessors.

Anyone who claims that rights to which he is entitled under the Act are being, or have been, denied him may apply to a Reinstatement Committee for the determination of 'any question relating to his rights' under the Act, and the Committee is to decide the matter. If they find an employer to be in default, they can require him to make available to the ex-service man or woman employment of the character, and on the terms and conditions, to which they consider the former employee is entitled under the Act. The tribunal can also, either in addition or as an alternative, order the employer to pay compensation to the applicant for any loss suffered by him, or likely to be suffered, by reason of the default.<sup>4</sup> An appeal lies to the Umpire from a decision or order of a Reinstatement Committee either by leave of the Committee or the Umpire, or without leave if the decision is not unanimous, or at the instance of a trade union of which the applicant was a member, or of an employer's association to which the employer belonged.

If an employer does not comply with an order made by a Reinstatement Committee requiring him to offer a specified job to a man or woman, he is liable to prosecution in a court of summary jurisdiction and to a fine not exceeding £100. The magistrate or justices can also order him to pay to the ex-service man a sum by way of compensation.<sup>5</sup>

#### TRIBUNALS FOR INDUSTRIAL INJURIES

The National Insurance (Industrial Injuries) Act, 1946, has effected one of the most drastic changes of our time, so far as the machinery of adjudication is concerned.

<sup>4</sup> Section 9.

<sup>5</sup> Section 11.

The system of workmen's compensation which has been in existence for the past fifty years was a great improvement on the utterly inadequate rights conferred by the common law on employees who were injured or killed in the course of their work. The Workmen's Compensation Act introduced the principle of absolute risk by abolishing the necessity for the workman or his dependants to prove negligence or moral culpability on the part of the employer. All that the claimant had to show was that the workman had suffered 'personal injury by accident arising out of and in the course of the employment'. In short, the employer's liability, on the one hand, and the employee's right to compensation, on the other, were deemed to arise from the risks inherent in the occupation itself.

This was a substantial advance on the previous position, both in common sense and social justice, but the practical advantages of the legislation were greatly curtailed by the failure of Parliament to provide a proper system of adjudication designed to ensure prompt and economical satisfaction of claims to compensation. All that the Workmen's Compensation Acts did was to confer legal rights to compensation on workmen or their dependants, and to leave them to enforce those rights as best they could, either by agreement with the employer or in arbitration proceedings, which in practice have almost invariably taken place before the county court judges. Alternative methods of arbitration permitted by the Acts are by a committee representing an employer and his workmen, or by a single arbitrator, but these were seldom, if ever, used. From the county court judges large numbers of cases went on appeal to the Court of Appeal, and a substantial number to the House of Lords.

Even at the end of the nineteenth century it must have been apparent that in a sustained series of conflicts in the courts between workmen and their employers (or the

employer's insurance company or mutual insurance association) the latter would inevitably possess great advantages on account of their superior resources in money, knowledge of their rights, professional skill and ability to wait.

Few people could have foreseen, however, the fantastic manner in which the legal decisions of the Workmen's Compensation Acts would proliferate year by year so as to form a veritable jungle of case law, through which neither light nor warmth could penetrate. Literally thousands of judicial decisions were given on the meaning of the words 'personal injury by accident arising out of and in the course of the employment', and yet the torrent showed no signs of abating, despite frequent protests from the House of Lords sitting in its judicial capacity. The vast mass of decisions served, indeed, rather to strengthen the stream of litigation than to diminish it, by adding to the number of 'competing analogies' which can be invoked in aid of one side or the other.

Money, time and professional skill have for nearly half a century been squandered in a scandalously wasteful manner in settling these claims. The fundamental reason is that, instead of a claim for compensation being determined on the grounds of public interest, it is opposed and obstructed at every stage by the adverse interest of the employer or his insurance company. The resources of numerous legal and medical practitioners have been devoted to resisting the payment of compensation to an injured workman or the dependants of one who has been killed, regardless of the human and social issues involved.

The whole system was utterly wrong in principle and highly detrimental to the welfare of the very people whom it was supposed to serve. Even where the workman received compensation, there was no attempt to provide him with the medical and rehabilitation services which

he may urgently need if he is ever again to resume his place as a productive member of the community.

The inherent defects of workmen's compensation are due to the fact that it is based on private rights, private negotiation, private disputes, private interests and private finance, as distinct from the social insurance schemes which are based on the principles of social rights secured by public administration, public interest and public finance.

These were the considerations which led me to conclude, in 1942, that 'the system of workmen's compensation as it now exists is indefensible; and such it will remain until the adverse interest of the employer or his insurance company or mutual trade association is removed, and the determination of the claim carried out by an administrative tribunal or commission having regard only to the public interest in the injured man or his dependants'.<sup>6</sup>

Both these desirable objectives are now in process of being attained. The National Insurance (Industrial Injuries) Act abolishes workmen's compensation and replaces it with arrangements by which industrial injuries and diseases are to be dealt with as part of the social insurance system. The adverse interest of the employer disappears since he is no longer responsible for meeting the claim. Employers and workpeople alike will contribute to the Industrial Injuries Fund, from which payments to injured workmen and their dependants will be made. Moreover, the principles of compensation will be altered so as to assimilate the position of an injured workman in several respects to that of a soldier who is killed or injured whilst serving in the armed forces.

<sup>6</sup> *Social Security*, edited by W. A. Robson, 2nd ed., p. 19. Most of what I have written above on workmen's compensation is taken from my introductory chapter to that book.



and inevitably to the courts, for in the United States several major States which have workmen's compensation systems more or less similar to our own have abandoned court administration in favour of more effective methods. Walter F. Dodd, in his authoritative study *Administration of Workmen's Compensation*, declares that 'where attempted in the United States, it may safely be said that court administration of workmen's compensation has failed. This has not been because of inefficiency in the courts, but because the judicial machinery is not, and cannot be, adapted to the new problems of administration presented by the system of workmen's compensation. The judicial function is primarily that of settling controversies between parties equal before the law. The principle of liability without fault of itself assumes an inequality between the parties, and this inequality is accentuated by the fact that in the great bulk of compensation proceedings the employer-employee relationship has given way to a relationship between the employee on the one side, and the insurance company carrying the employer's insurance risk on the other. . . . The essential purpose of compensation is not only equality of payment, but promptness and reduced expense to the injured workman. In addition, workmen's compensation, if properly administered, presents many problems of continuous supervision for which courts are ill-adapted. Judicial machinery, even though properly adapted to the settlement of private controversies, cannot, at the same time, meet the entirely different needs of an efficient system of workmen's compensation' (pp. 98-9).

It follows, therefore, that a transfer of jurisdiction from the courts to administrative tribunals was called for not solely in consequence of the changes of policy involved in replacing workmen's compensation by a system of national insurance for industrial injuries. It would have

been desirable even if workmen's compensation had been continued in its essential principles.

#### TRIBUNALS FOR FAMILY ALLOWANCES

After many years of discussion and agitation a scheme of children's allowances was introduced in 1945 on a modest and tentative scale. The Ministry of National Insurance, which had been set up only a few months previously, was made the department responsible for administering the scheme.

All claims for or in respect of an allowance are to be made to the Minister, and he is to decide any question as to the right to an allowance. If anyone is dissatisfied by the Minister's award or decision the matter is to be referred to one or more referees chosen from a panel, and their decision is final. The Minister is to prescribe by regulations the mode and terms of appointment of the panel of referees, the method of choosing individual names for particular references, and the procedure they are to follow. This is substantially the same type of adjudicating machinery as that which exists for determining claims and questions arising under the widows', orphans' and contributory old age pensions Acts. It is thus not peculiar to allowances which are paid entirely out of general taxation but originated with a contributory pension scheme. The distinction between contributory and non-contributory schemes of social provision has become of small significance so far as the individual's right to benefit is concerned. The modern practice is to confer a title to benefit in terms of an explicit legal right combined with a duty imposed on the appropriate Minister to pay allowance, pension, grant, or whatever the benefit may be called. The days of discretionary administrative charity, of which the poor law is the

supreme example, have receded into the dim background of legislative obsolescence.

#### THE LONDON BUILDING TRIBUNAL

A body which decides controversies closely connected with buildings and constructional work of all kinds in the metropolis is the Tribunal of Appeal operating under the London Building Act of 1930. That statute, which consolidated the main code by means of which the millions of structures which adorn or disfigure the face of London are regulated, gave large powers of control to the London County Council and certain other authorities, and at the same time set up<sup>3</sup> a tribunal of appeal to decide various questions relating to the exercise of those powers by the local governing bodies in London.

The tribunal consists of three members, one appointed by the Secretary of State, one by the council of the Royal Institute of British Architects, and one by the council of the Surveyors' Institute. The members are appointed for a term of five years, and are eligible for reappointment. They are remunerated for their services, and may be removed by the Lord Chancellor for inability or misbehaviour or other sufficient cause. No member or officer of the London County Council may sit on the tribunal.<sup>4</sup>

The tribunal has jurisdiction over a large number of questions of both a general and a technical nature. It has power to hear appeals from decisions of the London County Council regarding, for example, the laying-out of streets, the sanctioning of open spaces for working-class

<sup>3</sup> Or, to speak more accurately, continued an existing tribunal which had been constituted originally under the London County Council (General Powers) Act, 1890, altered by the L.C.C. (General Powers) Act, 1893, and established in its present form by the London Building Act, 1894.

<sup>4</sup> London Building Act, 1930, ss. 196-200.

dwellings and the erection of buildings at the rear of existing edifices; it can hear appeals from the refusal of district surveyors to approve the erection of a public building, or the conversion of a private building into a public one; it can hear appeals from the superintending architect concerning that vital matter the 'general building line', and that less vital but more amusing question which sometimes arises as to which side of a building is the front and which side the rear; and it can hear appeals from the chief engineer relating to houses situated on low-lying ground. Over these and many other questions the tribunal of appeal exercises a complete jurisdiction; its decisions are final on all questions of fact; and its determination is also binding on questions of law unless the High Court orders a case to be stated for the opinion of the court, or the tribunal itself desires to state a case.

#### FURNISHED RENT TRIBUNALS

The rent of unfurnished dwellings below a specified value has been rigorously and severely controlled for more than twenty-five years by the Rent Restriction Acts, but no effective control existed until recently in regard to the rent which could be charged for furnished dwellings and those in respect of which service is supplied to the occupants. The Furnished Houses (Rent Control) Act, 1946, seeks to restrain, through special tribunals, the profiteering which has arisen in this branch of business in consequence of the severe housing shortage.

The statute is to be applied by the Minister of Health to any district in which, after representation by or consultation with the local authority, he considers it to be expedient that its provisions should have effect. For each district in which the Act is in force a tribunal is set up consisting of a chairman and two other members, all

appointed by the Minister and holding office during his pleasure.<sup>7</sup>

Either party to a contract for a furnished letting or one which includes payment for services may refer the contract to the tribunal for consideration. The local authority may, if they wish, bring the matter before the tribunal. The tribunal may demand from the lessor such information as it requires regarding particulars to be prescribed by regulation. It must give the parties an opportunity of being heard or of submitting written representations, and shall then either approve the rent payable under the contract or reduce it to such sum as it may think reasonable in the circumstances. Alternatively, it may dismiss the reference. Where a rent includes payment for services the cost of which has risen, the tribunal may approve an increase in the rent so as to cover the increased cost of providing the services. A register of rents which have been approved, reduced or increased under this procedure is to be kept by the local authority. Once an entry has been made in the register of the rent payable for any premises it is illegal to require or receive any larger sum or to demand or accept any fine, premium, or other consideration as a condition of the grant, renewal or continuance of a contract for letting the premises.<sup>8</sup> The Minister is empowered to make regulations regarding the tenure of office of members of the tribunal, their proceedings and a number of other matters.

The notable feature of this Act is that it authorises the setting up of administrative tribunals to deal with a type of subject-matter which by tradition lies peculiarly within the province of the courts of law. There is no more typical, well-worn and familiar branch of English private law than that dealing with landlord and tenant. All the

<sup>7</sup> Section 1 and Schedule. See also *Furnished Houses (Rent Control) Regulations*, S. R. & O., 1946, No. 781.

<sup>8</sup> *Actic* 3

Rent Restriction Acts have retained the county courts as the judicial forum. Here, for the first time, we find Parliament looking towards an entirely new type of tribunal.

THE REGISTRAR OF FRIENDLY SOCIETIES AND INDUSTRIAL  
ASSURANCE COMMISSIONER

For centuries unincorporated voluntary associations have played an important part in English life. Most of these bodies are neither recognised by the law nor supervised by the Government. Certain classes of them have, however, for divers reasons been the subject of legislation and some degree of public regulation.<sup>7</sup> I shall have occasion in a later chapter<sup>8</sup> to consider the domestic tribunals which these bodies frequently establish for the settlement of disputes arising with or between the members. Here we are concerned only with the functions of the public official who is charged with administering the legislation.

The main categories of voluntary associations which claim attention in this connection are friendly societies, collecting societies engaged in industrial assurance and trade unions.

The officer charged by Parliament with responsibility for regulating these bodies is the Chief Registrar of Friendly Societies. He is appointed under the Friendly Societies Act, 1896,<sup>9</sup> and must be a barrister of not less than twelve years' standing, unless he has served as an assistant registrar for at least five years. He is the head of the central office, which is manned by professionally qualified assistant registrars, actuaries and accountants, together with a clerical staff. The chief registrar and his staff are all civil servants.

The principal duties of the registrar under the Friendly Societies Acts are to register any friendly society which

<sup>7</sup> Dennis Lloyd, *Law of Unincorporated Associations*, passim.

<sup>8</sup> See Chapter 4.

<sup>9</sup> Section 1.

applies to be registered on being satisfied that it has fulfilled the statutory conditions. For this purpose he has to examine its rules to see that they comply with the law. In addition, he must prepare and circulate to friendly societies model forms of accounts, balance sheets and valuations; collect, publish and circulate vital statistics and other information of interest to the members of such bodies; and prepare actuarial tables for their use.<sup>1</sup>

In the course of his work the chief registrar may have to perform duties of a judicial nature. These include hearing an appeal by a society from the refusal of an assistant registrar to register it.<sup>2</sup> If the chief registrar rejects the appeal the society can go a step further and appeal to the High Court, but this does not affect the judicial character of the chief registrar's intermediate jurisdiction. If a dispute occurs between a member or someone claiming through a member or under the rules of a registered association, on the one hand, and a society or one of its branches or officers on the other, the parties may by consent refer the dispute to the chief registrar or one of the assistant registrars, who is authorised to hear and determine it. A like jurisdiction is conferred in the case of disputes between a former member of a registered friendly society, or anyone claiming through him, and the society, or one of its branches or officials; between a registered branch and the society of which it forms part; between two or more registered branches of a society or any officers thereof; and in certain other disputes.<sup>3</sup>

In all these types of cases the disagreement can be laid before the chief registrar by agreement between the parties unless the rules of the society or branch expressly forbid such a course being taken. The registrar must

<sup>1</sup> Section 2.

<sup>2</sup> Friendly Societies Act, 1896, s. 12.

<sup>3</sup> *Ibid* s. 8.

then obtain the consent of the Treasury before proceeding to hear the matter. If this is given he is clothed with authority to administer oaths, to require the attendance of all parties concerned and of witnesses, to compel the production of books and documents, and, finally, to give a binding decision.

Under the legislation regulating trade unions, the Chief Registrar of Friendly Societies exercises somewhat similar functions in regard to registration. He must be satisfied before registering a combination as a trade union that under its constitution the principal objects of the association are 'statutory objects': that is, the regulation of the relations between employers and workpeople, or between workpeople and workpeople, or between employers and employers, or the imposing of restrictive conditions on the conduct of any trade or business, together with the provision of benefits to members.<sup>4</sup> He can withdraw a certificate of registration if the constitution of the union has been altered in such a manner that, in his opinion, the principal objects of the union are no longer statutory objects, or if, in his opinion, the principal objects for which the union is actually carried on are not statutory objects. A union which does not desire to be registered may nevertheless apply to the registrar for a certificate declaring it to be a trade union, and the registrar can, if he is satisfied that the statutory requirements are fulfilled, grant a certificate to that effect, which, so long as it is in force, is conclusive evidence of the union's status for all purposes. This certificate, like the registration, can be withdrawn.

An appeal lies to the High Court at the instance of any person aggrieved at the decision of the registrar. 'This section', observes Lord Justice Slesser in his authoritative treatise on *Trade Union Law*, 'appears to give the

<sup>4</sup> Trade Union Act, 1913, ss. 1, 2.



registrar judicial powers of inquiring into the actual conduct of the trade union.’<sup>5</sup> And elsewhere he emphasises that ‘the words of this section are very wide, and appear to give the registrar considerable judicial power’.<sup>6</sup>

A trade union may not engage in political activities involving expenditure of its funds on certain specified purposes unless a prescribed procedure has been followed. These must first be a ballot of its members on a resolution as to whether the union shall engage in political activities. If the furtherance of political objects is approved by the members the union must have rules in force which provide for a separate political fund; for any member who wishes to do so to claim exemption from contributing to the political fund; for a member who is so exempt not to be excluded from any of the benefits of the union or placed under any disability compared with his fellow members; and for ensuring that willingness to contribute to the political fund is not made a condition of admission to the union.<sup>7</sup>

If any member of a trade union alleges that he is aggrieved by the breach of a rule made in pursuance of these statutory provisions, he is entitled to complain to the Registrar of Friendly Societies, who is to give the complainant and any representative of the union an opportunity of being heard. If the registrar considers that a breach of the rules has been committed he may then make whatever order for remedying the matter which he considers just in the circumstances. Any order of the registrar is binding and conclusive on all parties without appeal, and can neither be questioned in a court of law nor restrained by injunction.<sup>8</sup> On being recorded in

<sup>5</sup> Slesser & Baker, *Trade Union Law*, 3rd ed., p. 121.

<sup>6</sup> *Ibid.* p. 143.

<sup>7</sup> Trade Union Act, 1913, s. 3.

<sup>8</sup> *Forster v. National Amalgamated Union of Shop Assistants, Warehousemen and Clerks*, [1927] 1 Ch. 539.

the county court it is enforceable in exactly the same way as an order of the court.

The chief registrar exercises certain other powers of a judicial nature in regard to both trade unions and friendly societies. He also performs judicial functions relating to industrial assurance companies or collecting societies in his capacity as Industrial Assurance Commissioner. For example, he has power to decide disputes between a collecting society or industrial assurance company and a member or person assured, or any person claiming through a member or person assured, or under any insurance policy, or under the rules, etc., or any former member or anyone claiming through him. The commissioner has jurisdiction in these different kinds of dispute concurrently with the county court, except that if only one party wishes to refer the matter to him he can deal only with a claim not exceeding £50 and in which there is no allegation of fraud or misrepresentation, and the legality of the policy is not questioned. If both parties agree to refer the matter to him none of these limitations applies.<sup>9</sup>

The Chief Registrar of Friendly Societies and Industrial Assurance Commissioner is essentially an administrative official, though not under Ministerial control. His duties and powers are laid upon him directly by legislation and he is required to make reports direct to Parliament. In some matters he can act only with Treasury approval, and for ordinary housekeeping purposes his office is subject to the normal governmental regulations. His position is essentially that of a public officer.

That does not make him any the less of an administrative tribunal in respect of the many judicial functions which he performs in the course of his official duties. The chief registrar submitted to the Committee on Ministers'

<sup>9</sup> Industrial Assurance Act, 1923, s. 32 (1).

Powers that his functions could by no reasonable methods of construction be brought within the terms of reference of the committee,<sup>1</sup> since neither he nor the registrars who assist him exercise their judicial powers by or under the direction of a Minister of the Crown, nor is any of them appointed specially by a Minister for the purpose.<sup>2</sup> That is true, but it merely indicates the inadequacy of the committee's terms of reference. It certainly does not provide any good reason for excluding the chief registrar from the category of administrative tribunals, for he should clearly be included among them.

So far as his judicial powers are concerned, the chief registrar protested that 'they are exercised with personal responsibility, publicity, uniformity and the hearing of the parties, and therefore satisfy all the conditions of an ordinary court of law and do not resemble in the least, it is apprehended, the operations which the committee is appointed to inquire. They are exercised directly under the statutes, and no Minister has any power to interfere with the hearing or decision in any way'.

It is impossible to believe that the chief registrar has fully grasped the implications of his own office when he declares that it satisfies 'all the conditions of an ordinary court'. For the chief registrar and the central office over which he presides are entirely different from a court of law. The office is an agency of the central government engaged in administration, supervision, inspection and the collection of information relating to particular classes of institution. Only a small fraction of the work is judicial in character, and it is confined to a narrowly specialised sphere. The judicial powers of the chief registrar are incidental to his other functions and in no sense central to his office. The chief registrar's office closely resembles

<sup>1</sup> See pp. 317-8.

<sup>2</sup> Committee on Ministers' Powers: Evidence, Vol. 1, p. 72.

in type one of the great regulatory commissions which abound in the United States.<sup>3</sup>

#### WAR COMPENSATION TRIBUNALS

Immediately upon the outbreak of war on September 3, 1939, legislation was passed to provide for compensation in respect of action taken on behalf of the Crown in the exercise of the emergency powers with which the Government had been invested. The Compensation (Defence) Act defined the circumstances in which compensation would be payable, the principles on which it should be assessed and the methods of adjudication in case of dispute.

The Act established two tribunals: a Shipping Tribunal for deciding disputes regarding compensation for vessels which had been requisitioned, or for space or accommodation in them which had been taken by a government department; and a General Claims Tribunal for hearing all other disputes arising from this source. The Shipping Tribunal is composed of a president and two other members appointed by the Lord Chancellor. Two of them must be lawyers with special knowledge of commercial and admiralty law; the third member is to be qualified as an average adjuster or accountant.

The General Claims Tribunal is also appointed by the Lord Chancellor. In this instance he is left entirely unfettered in his discretion, except that the tribunal must consist of at least seven persons, of whom one must be a judge of the High Court. The tribunal may sit in several divisions, each of which must contain not less than three members of the tribunal.

Each of the tribunals is given the same power to subpoena witnesses and to compel the production of

<sup>3</sup> J. Landis, *The Administrative Process*; R. M. Cushman, *The Independent Regulatory Commissions*.

documents as the High Court. It can award costs. It may appoint assessors and experts to aid the tribunal in its deliberations and fix their remuneration. It may make rules governing the notification, presentation and hearing of claims, subject to the concurrence of the Lord Chancellor.<sup>4</sup>

#### THE COMMISSION ON AWARDS TO INVENTORS

In what has been said above in regard to administrative tribunals I have, with certain exceptions, confined myself to the judicial powers possessed by Ministers of the Crown responsible to Parliament and the Cabinet, and exercising their functions through great departments of State employing hundreds or thousands of officials, or through administrative tribunals nominated by Ministers and directly or indirectly controlled by them. But this simplicity of type disappears on a close investigation, and we find ourselves confronted by a mass of tribunals, public or semi-public in character, which have large adjudicating functions to perform, yet which are neither courts of law on the one hand, nor administrative tribunals in the ordinary sense on the other hand. There is, for example, a body like the Royal Commission on Awards to Inventors, which was originally appointed to determine what sums should be paid by the Government to inventors in respect of the use by the Crown of their inventions during the war of 1914-1918.<sup>5</sup> A judge of the High Court was appointed chairman of the commission, which was, as the commissioners themselves pointed out in their first report, 'an obviously independent tribunal'. The Royal Commission was established to supersede the Treasury,<sup>6</sup> which had previously been given

<sup>4</sup> Compensation (Defence) Act, 1939, ss. 7-9.

<sup>5</sup> Royal Commission on Awards to Inventors; see First Report, Cmd. 1112 '1921.

<sup>6</sup> Patents and Designs Act, 1907, s. 29.

the task of settling the amount of compensation to be paid by a government department to an inventor whose invention had been used by the department. The commission refused to accept the view that the designation of the Treasury originally as the deciding authority meant that the adjudicating body was to have 'a statutory bias' against inventors claiming from the Crown.<sup>7</sup> The basis of award, they said, was to be a 'fair and reasonable price' based on a 'fair and impartial adjudication'.

The Royal Commission on Awards to Inventors, despite its judicial chairman, is a tribunal whose work is done in a manner very different from that followed by an ordinary court of justice, whether in regard to patent cases or any other type of dispute. Thus, in attempting to discover the exact meaning of 'a fair and reasonable price' the first Royal Commission was driven to take into their reckoning a series of social and economic considerations of an elaborate and complex character which no English court of law would dream for a moment of investigating in an ordinary case. Should the basis of remuneration be a royalty? Should a royalty basis (if allowed) be maintained even where, owing to enormous numbers of an article being manufactured, the amount payable to the inventor would bear no relation to the technical merit of the invention? Should attention be paid to the personal position of the inventor?<sup>8</sup> Questions of this kind, involving conceptions of economic justice which would not be admissible in the trial of a private claim in an ordinary court of law, played an important part in determining the awards of the first Royal Commission. So much we know from the commissioners' own report, although they adopted the unfortunate habit to which administrative tribunals are prone of not stating

<sup>7</sup> Cmd. 1112/1921.

<sup>8</sup> Cmd. 1112/1921, p. 5.

the reasons for their decisions in individual cases. It is to be hoped the present Royal Commission will not follow this undesirable practice.

The first Royal Commission did not complete its task until 1937. In the eighteen years during which it sat, it dealt with more than 1,800 claims, of which about three-quarters were either rejected after inquiry by an investigating committee set up by the commissioners or abandoned in the early stages.

In 1946 it was announced that another Royal Commission had been appointed to determine awards to inventors in respect of the use of their inventions, designs, drawings or processes by government departments and Allied Governments during World War II. A judge of the High Court was again appointed to be chairman, while most of the other members possess scientific, technical and legal qualifications.

The terms of reference provide that any dispute between the owner of a patent or a registered design and the government department concerned can by agreement be referred to the Royal Commission instead of being disposed of by a court or some other method. The Commission may then proceed to decide and settle the dispute. Its authority extends to investigating and determining, where necessary, questions of infringement and validity. This jurisdiction can only be exercised where the owner of a patent or design agrees to accept the commissioners' decision.

The Royal Commission is also charged with determining the compensation payable to the licensor of a patent, where, under the terms of an agreement between the British Government and the United States Government signed in March, 1946, a licence authorising the use of an invention, discovery or design has been granted by the former to the latter. Here the Commission is to have

regard to the utility of the invention, discovery or design, to the extent of its use, and any other relevant factors.

The commissioners are also given some other functions of an advisory and discretionary nature. They may, at the request of the Treasury, recommend whether Treasury approval shall be given or withheld from an agreement or proposed agreement between the owner of an invention and a government department concerning the terms of user. Lastly, they can (again at Treasury request) recommend the payment of remuneration to an inventor, author or owner of an invention, design, drawing or process which has been used by a British or Allied Government Department, even though the claimant has no statutory right to payment and no monopoly against the Crown.<sup>9</sup>

#### CONCLUSION

We have now travelled a considerable distance away from the simple type of Administrative Tribunal with which the earlier part of this chapter was concerned: namely, the government department armed by Act of Parliament with judicial powers analogous to those normally carried out by the courts of justice. During the course of the description we have made our way through a veritable maze of adjudicating bodies of all kinds—from a Royal Commission awarding compensation for inventors to Independent School Tribunals investigating charges against private and public schools. The structure of all these bodies—and those we have described above do not exhaust the whole number that exists—varies enormously in character and complexity; and so does the precise nature of the function to be carried out. Whatever else may be said of our inquiry, it is scarcely one which is remarkable either for the simplicity of the phenomena

<sup>9</sup> Hansard, Commons, May 14, 1946, col. 1676-7.



under observation, or the homogeneous nature of the legal institutions with which it is concerned.

There is one characteristic which is, however, common to all the various tribunals with which we have so far been dealing: namely, the fact that they are all of a public or official nature. That is to say, they all either form part of or are connected with the central government, responsible to a sovereign Parliament elected on a democratic territorial franchise, as in the case of an administrative department of State such as the Ministry of Health; or they are constituted through the action of a public administrative agency, such as a department of the Government, as in the case of the Umpire under the Unemployment Insurance Acts, or the Chief Registrar of Friendly Societies, both of whom are appointed by, or on the recommendation of, Ministers of the Crown. All these administrative tribunals are, in fact, of the sort that may shortly be termed official or governmental. There is some public control, potentially at least, over the appointment and tenure of office of the member or members (or some of them) of the tribunal, no matter how small or ineffectual or remote that control may be in practice. This alone is sufficient reason to warrant their being grouped together under a single designation. The most suitable group title appears to be 'Administrative Tribunals'—the word administrative being here, as before, taken to refer particularly to the administration or conduct of public affairs. An administrative tribunal is the title frequently used in the United States to denote a commission, board, or officer which has power to try questions of law and fact, and to make a decision thereon binding on private persons and affecting private rights<sup>1</sup>;

<sup>1</sup> See W. H. Pillsbury, 'Administrative Tribunals', 36 *Harvard Law Review* 407. See also J. Landis, *The Administrative Process*.

and we can employ the term here in much the same sense.

A whole series of questions of considerable importance is raised by the mere enumeration and description of all these administrative tribunals. Why have they arisen? Are they an improvement on the courts of law? Do they tend to threaten or preserve the liberty of the subject? What are their advantages and disadvantages? Are they increasing in number? Do they promote the social welfare? Have we developed in England a system of administrative law comparable to that existing on the Continent, and if so, is it a good thing? These, and a score of other questions, spring to the lips and demand an answer.

I may not be able to produce final and conclusive answers to all these questions, but I shall at any rate endeavour to face the main issues involved. Before, however, attempting to analyse the causes which have led to the rise of this mass of administrative tribunals, or endeavouring to evaluate the results which they have produced, it is desirable that we should first complete the survey of judicial institutions which has here been attempted.

In order to do this it is necessary to remember that so far all mention has been omitted of those bodies which have for long possessed authority to make decisions of an important kind closely affecting the livelihood and social opportunities of millions of citizens, but which, nevertheless, have no connection, direct or indirect, either with the courts of law on the one hand or the executive arm of the government on the other hand. I refer to the jurisdiction exercised over their members by nearly all the vast number of voluntary societies into which it has become the custom for men and women living in this country to group themselves. These groupings, based on the voluntary co-operation of individuals

for the purpose of organising a profession, following an occupation, observing a religion, playing a game, enjoying a common social life, or attaining some other desired object, are distinct from the compulsory organisation of citizens on a geographical basis with which we have previously been dealing; and the judicial organs, the deciding authorities, may be similarly distinguished. I shall refer to those belonging to voluntary associations based on functional grouping as domestic tribunals—an unsatisfactory term, no doubt, but one which possesses the merit of suggesting an antithesis to the official flavour of ‘Administrative Tribunals’. I propose to devote the following chapter to a survey of these domestic tribunals, and to an examination of the vast powers which they wield.

## CHAPTER 4

### DOMESTIC TRIBUNALS

Voluntary Associations—Their Judicial Functions—Their Organs of Justice—The Attitude of the Judicature—Natural Justice—Immunity from the Courts—Vocational Organisations—An Absence of Control—The Marketing Board Movement—The Falmouth Committee—Conclusion.

#### VOLUNTARY ASSOCIATIONS

THE association and co-operation of human beings in voluntary groups is one of the most important facts of social development. As life becomes more highly organised and complex, the groups formed by men and women associating freely for particular purposes increase in number, size, power and diversity. In England today, for example, it is impossible even to enumerate the countless thousands of voluntary associations which exist for one purpose or another.

These societies exist for the most part with the object of furthering a purpose common to the members, and of protecting the interests of the members in the fulfilment of that purpose. The purposes of voluntary societies extend over a vast field, ranging from the profession of a religion to the playing of bowls, from the pursuit of a gainful occupation to the furtherance of archæological research, from the promotion of vegetarianism to the mere sharing in common of a club-house and social amenities.

The legal status of these bodies varies in English law according to the nature of their origin. Thus, a trading group, if it is created in accordance with the statutory provisions of the Companies Acts, will in law become a corporation, and stand possessed of all the privileges attaching to the anthropomorphic personality with which

our lawyers have invested such bodies. It will be only a partnership if the relations of the individuals are crystallised in a deed of partnership. An organised body of scientists may receive a charter from the Crown and become incorporated thereby; or they may remain a mere voluntary society, hardly recognised by the law of England. The legal status of a group is often a matter of considerable consequence, particularly in England, where very little legal recognition is given to the myriads of unincorporated societies which exist, despite the dominant part which they play in many spheres of the national life.<sup>1</sup>

But we shall not here be concerned with the manner in which the legal status of these bodies is differentiated. For the purpose we have in hand they may all be regarded as functional groups, and we may think of them as voluntary associations (though it may not always be correct in strict law<sup>2</sup> to describe them as such) in order to distinguish them from the compulsory association of citizens in various forms for the divers purposes of the State.

The fact that a body is generally a voluntary society does not necessarily mean that every member has joined it of his own spontaneous desire, or even of his own free will. A man cannot practise at the bar unless he is a member of one of the Inns of Court, nor get a job in a strongly organised trade unless he is a member of the appropriate trade union; nor carry on a business in many branches of commerce without belonging to the trade association which controls it; and in these and similar cases entry into the occupation necessitates membership of the voluntary association. On the other hand, most

<sup>1</sup> English law only recognises two kinds of juristic person or entity, an individual and a corporation.

<sup>2</sup> The term 'voluntary association' is often reserved to describe specifically those societies which are unincorporated.

people join a club or a learned society of their own free will, not because they are virtually compelled to do so in order to attain a desired end, but because it is likely to be pleasurable or profitable or of assistance in furthering ends which are already pursued by the individual through other channels.

All that is implied by the conception of a voluntary association is, in fact, the idea of a group that was *originally* created by the voluntary coming-together of free persons for the furtherance of a common purpose, and the embodiment of that coming-together in some more or less permanent and tangible institution. This is the mark and sign of the true voluntary society, and often enough, indeed, the only 'voluntary' element to be found remaining in the coercive, ruthless, arbitrary and autocratic bodies which sometimes pass by that name.

The name denotes, then, a vast number of free-born groups which are continually coming into existence, functioning with a greater or less degree of effectiveness, and dying; which vary infinitely in size, importance, wealth, power and longevity; which pursue a multitude of diverse purposes; and which often compete, consciously or unconsciously, for the allegiance of the men and women who belong, or who might belong, at one and the same time to several groups pursuing unco-ordinated ends. Sometimes the particular specimen is frail and ludicrous; and we smile at the spectacle of the local skittles club, with its twopenny-halfpenny subscription, constant altercations, and early demise. But we do not smile if the Miners' Federation threatens to call out three quarters of a million men on strike or when a stoppage of work by even a few men in the gas industry cuts off our supplies of an essential service. Taken in the aggregate, the voluntary associations, with membership rolls running into hundreds of millions and a huge accumulation of property, present a formidable array of power; and their

activities extend into almost every field of human activity—economic, professional, religious, educational, political, scientific, athletic, artistic, social, and one knows not what else.

#### THEIR JUDICIAL FUNCTIONS

All this is by way of introduction, in order to suggest the full scope of what Sir Frederick Pollock refers to when he speaks of the ‘divers persons and bodies called upon, in the management of public institutions or government of voluntary associations, to exercise a sort of conventional jurisdiction analogous to that of inferior courts of justice’.<sup>3</sup> For here we come to the relevant point of this disquisition; which is, that all these voluntary associations exercise very extensive judicial powers over their members.<sup>4</sup>

One of the fundamental characteristics of a voluntary society is the notion that it should be autonomous, and that its powers of self-government should not be interfered with save in exceptional circumstances. What those powers are will depend in every case on the constitution of the association, which is to be found in the rules of membership, or in the royal charter, or in the memorandum or articles of association, or in the provisions of the empowering statute, or sometimes even in the persistent record of history or the low murmur of tradition. But these powers of self-government are usually considerable in extent.

The power to exclude from membership persons regarded as not suitable or desirable is one of the most elementary powers possessed by nearly all voluntary associations, save in the case of a few bodies which exert entire control over a profession or occupation and which,

<sup>3</sup> *The Law of Torts*, 11th ed., p. 97.

<sup>4</sup> See H. A. Smith, *Law of Associations*; Haslam, *The Law relating to Trade Unions*.

as a result, are compelled by law to admit to membership individuals possessing specified qualifications, unless good reason to the contrary exists. But this ability to refuse admittance is not so much a jurisdiction exerted over the members themselves as a kind of negative power to exclude the rest of the world.<sup>5</sup>

Much more important is the right to expel a person who is already a member for an offence against the common code of conduct prescribed by the society. This, indeed, is usually the most severe penalty which can be imposed by a voluntary association. To be expelled from a vocational association may mean economic disaster; to be turned out of an exclusive club may ruin a man socially. We shall deal with this matter at greater length later on.

The ability to exclude and expel is not the only kind of penal power commonly possessed by voluntary associations. A member may be penalised under the constitution by the withholding of financial or other benefits to which he would normally be entitled, as in the case of a trade union; or the organisation may withdraw the protection or support or assistance which it is in the habit of affording to members. Again, members who infringe the rules may sometimes be called upon to pay a fine, which will often be paid regardless of whether it is legally recoverable or not. Further, an individual may be subjected by his fellow-members to various subtle forms of social ostracism while still retaining all the tangible or formal privileges of membership.

During the past twenty or thirty years a new and most potent weapon has been devised by trade associations for enforcing their policies not only on their members but also on persons or firms not belonging to the organisation.

<sup>5</sup> A very effective negative jurisdiction in some cases; for example, to be blackballed by a club may be extremely injurious from a social point of view.



This weapon is known as the stop list. It consists of a list containing the names and addresses of companies, firms or individuals who have offended against the rules or principles of the association in regard to prices, wages, output, employment conditions, advertising or some other aspect of commercial or industrial life. The members of the association are normally required to have no further dealings of any kind with persons, etc., whose names appear on the stop list until such time as they are removed therefrom. Sometimes the stop list mechanism is operated in a negative manner by publishing a list of approved traders or employers who are in good standing with the association: the omission of a particular name from such a list produces a like result.<sup>6</sup>

The effect of being included in the stop list of a powerful trade association is usually to cut off from the offending party all the supplies of goods or labour on which his business depends. Sometimes it will involve similar action, or a threat of it, on any of his customers or suppliers who continue to deal with him. It may thus spell economic disaster, and possibly ruin, for a manufacturer or business concern which incurs this particular sanction of trade association or trade union policy. In an attempt to devise less stringent methods of enforcing their policies, trade associations have developed the practice of imposing heavy fines, sometimes amounting to hundreds of pounds, as an alternative to publishing the names of offenders in the stop list, where there are mitigating circumstances and the firm in question is willing to give the necessary undertaking about its future conduct.

The whole of this field of action by voluntary associations has been exposed to the full view of the law and of the general public in a series of cases which have

<sup>6</sup> *Vacher & Sons, Ltd. v London Society of Compositors*, [1913] A.C. 107.

occupied the attention of the highest courts, both civil and criminal, during the past quarter of a century.<sup>7</sup> Without describing in detail the more complex aspects of the law of civil conspiracy, it may broadly be said that the House of Lords has repeatedly upheld the right of trade associations to penalise both members and non-members who have failed to conform to policies designed to protect or promote the genuine trade interests of the organisation, by publishing their names in a stop list. The right to impose a fine in substitution of this penalty has also been recognised as a lawful method of enforcing its policy by a trade association. The right to expel is, of course, unaffected by these more recent developments.<sup>8</sup>

#### THEIR ORGANS OF JUSTICE

Nearly every voluntary association has some 'judicial' organ which is charged with the task of hearing complaints against a member,<sup>9</sup> of arriving at a decision concerning his innocence or guilt, and of determining what rule applies or what penalty, if any, should be imposed. In some cases it may be a single person who is appointed to discharge the judicial function, as in the case of the vice-chancellor of a university; in others it may be the whole body of members. The most common case of all is to find the executive committee armed with authority to inquire into and determine the matter, but sometimes a special appeals or discipline committee exists for the purpose.

All these organs of authority, armed with power, essentially judicial in its nature, to hear and determine an immense number of questions closely affecting the

<sup>7</sup> *Ware and de Freville v. Motor Trade Association*, [1921] 3 K.B. 40; *R. v. Denyer*, [1926] 2 K.B. 258; *Hardie and Lane v. Chilton and Others*, [1928] 2 K.B. 306; *Thorne v. Motor Trade Association*, [1937] A.C. 797.

<sup>8</sup> For an account of the working of the Motor Trade Association, see K. C. Johnson-Davies, *Control in Retail Industry*, passim.

<sup>9</sup> Or against non-members, where the policy of the association extends to the control of outside persons.

rights and duties of individual members, may be designated domestic tribunals, in contradistinction to the courts of justice on the one hand and administrative tribunals on the other. In the following pages I propose to discuss the nature of their jurisdiction, and the manner in which it is or should be, in the eyes of the law, exercised.

#### THE ATTITUDE OF THE JUDICATURE

What is the attitude of the courts of law towards these domestic tribunals?

The first thing to be noted is that the courts of law decline to interfere in any way with the authority of a domestic tribunal unless some kind of property right is involved. The foundation of the overriding jurisdiction of the courts in regard to voluntary associations is the right of property vested in the members, of which they may be deprived by unlawful or unjust expulsion. There is no jurisdiction, said the judge in a leading case on the subject,<sup>1</sup> 'to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together when the association possesses no property. A dozen people may agree to meet and play whist at each others' houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any court of justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternatively at each others' houses, or any place where there is a possibility of their meeting each other, but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any court of justice could interfere . . . if some of the members

<sup>1</sup> *Rigby v. Connol* (1878), 14 Ch.D. p. 482.

declined to associate with some of the others. That is to say, the courts, as such, have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy'.

In this connection, one may add, the term 'property' is used apparently in a wide sense, and must be taken to include, for example, the right to practise an occupation.

Where property rights are involved, the courts regard the proceedings of the tribunal as being 'in the nature of judicial proceedings, although the forum is a domestic one'.<sup>2</sup> But despite the fact that the body is 'acting judicially',<sup>3</sup> the courts do not, generally speaking, go further than to require that the principles of what they term 'natural justice' shall be followed, and certain other elementary conditions satisfied. If the domestic tribunal departs from 'the ordinary principles of justice'<sup>4</sup> it does so at its peril, and is liable to have its decision set aside and declared void by the court.

#### NATURAL JUSTICE

The principle of natural justice 'is that a man shall not be removed from office or membership, or otherwise dealt with to his material disadvantage, without fair, adequate, and sufficient notice being given to him of what is alleged to his detriment, and of having an opportunity of meeting the accusations which are brought against him. In no circumstances may a man be deprived of any part of his property by a tribunal without having an opportunity of

<sup>2</sup> *Leeson v. General Council of Medical Education* (1889), 43 Ch.D., p. 366, Bowen, L.J.

<sup>3</sup> *Ibid.* Cotton, L.J.

<sup>4</sup> *Fisher v. Kean* (1878), 11 Ch.D., p. 353.

<sup>5</sup> See *R. v. Chancellor of Cambridge, Strange I*, p. 566, in which Fortescue, J., explained why 'the laws of God and man both give the party an opportunity to make his defence'.

being heard and making his defence.<sup>6</sup> The courts are extremely zealous in the enforcement of the maxim *audi alteram partem*,<sup>7</sup> and there are innumerable cases in the reports where decisions have been quashed on this account.

A typical example was the attempted expulsion of the late Mr. Labouchere from the Beefsteak Club. The committee of the club called upon Mr. Labouchere, who was a member, to resign on the alleged ground that his conduct was injurious to the interests of the club. He refused, and a general meeting of all the members was summoned and a resolution for expelling him moved and carried. The court to which Labouchere appealed held that the committee acted without full inquiry, and without giving the plaintiff notice of a definite charge, with the result that the resolution purporting to expel him was bad and of no force.<sup>8</sup> In a later case a member of the Bath Club who was expelled without being given a hearing was awarded substantial damages against the club. In one case the expulsion of a member from a women's club was held to be invalid merely because one of the fourteen members of the committee (a lady of title who had only consented to stay on the committee on condition that she was not bothered) had not received a notice of the meeting of the committee at which the question of the member's conduct was to be considered.<sup>9</sup> This rule has been widely applied, not only to clubs, trade unions, and other voluntary associations, but also to various tribunals and bodies of persons invested with authority to adjudicate upon matters involving pecuniary consequences to individuals.<sup>1</sup> Thus, for example, where the master of a school who had been appointed under a trust deed by three vicars, was served with a notice of dismissal signed

<sup>6</sup> *Capel v. Child* (1832), 2 C. & J. 558.

<sup>7</sup> *Wood v. Wood* (1874), L.R. 9 Ex. 190.

<sup>8</sup> *Labouchere v. Earl of Wharnccliffe* (1879), 13 Ch.D. 346.

<sup>9</sup> *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523.

<sup>1</sup> *Wood v. Wood* (1874), L.R. 9 Ex. 190.

by two of them, and it was proved that no meeting of the three vicars had taken place to discuss the matter, it was held that the master could not be removed from his post without having an opportunity of being heard by all three clergymen.<sup>2</sup> In another case, the rules of a police pension society in Montreal provided that every application for a pension should be fully investigated by the board of directors, and that any member who was dismissed or obliged to resign should have his case considered by the board as regards a right to pension. A certain member of the force was obliged to resign, and the directors, without any 'judicial inquiry' into the circumstances, refused his claim to pension 'seeing that he was obliged to tender his resignation'. The Judicial Committee of the Privy Council held that the resolution of the directors was bad and that the case must be considered afresh by a different board.<sup>4</sup>

In this case, as in *Labouchere's* and many others, the precise rights of the member depended on the rules of the society as well as on the common law conception of natural justice; but the underlying idea is that the mind of the tribunal is not and cannot be sufficiently informed to arrive at an equitable decision unless, first, the person whose case is being considered has a chance to make a statement to the tribunal, and secondly, each and every member of the tribunal has an opportunity (of which he may or may not avail himself) of consulting with and influencing his colleagues in their joint decision. This conception is quite antithetic to the idea of counting heads; for if a tribunal consisted of fifty persons, of whom forty-nine were present and unanimously agreed on the decision, that determination would, nevertheless, be invalid if the fiftieth member was excluded from the

<sup>2</sup> *Fisher v. Jackson*, [1891] 2 Ch. 84.

<sup>3</sup> *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montréal*, [1906] A.C. 535.

deliberations. The decision is regarded as the common determination of the tribunal as a whole, as in the case of judgments in a court of law, and the mere preponderance of opinion in a given direction, however overwhelming numerically, is not in theory conceived of as being impervious to the wisdom of an absent Solomon. The minds of adjudicators, no matter how little acquainted they may be with legal ideas or the spirit of justice, are supposed to be unlike those of party politicians: that is, they must not be made up before the debate, but must remain liable to be shaken by cogent reasoning or persuasive oratory.

#### IMMUNITY FROM THE COURTS

There are two other conditions which are imposed by the courts on the proceedings of domestic tribunals. The first of these is that the tribunal must not exceed its jurisdiction, but must carefully confine itself within the scope of its authority, whatever that may happen to be. Lord Justice Bowen, referring to the power given to the General Medical Council to erase from the register the name of any medical practitioner who was found, after due inquiry,<sup>4</sup> to be guilty of 'infamous conduct in any professional sense', remarked that the only thing that the courts could investigate when proceedings of this kind were brought before them, was whether the domestic

<sup>4</sup> The rules of natural justice must be observed and, except in the case of a criminal conviction, the General Medical Council must hear any evidence which the medical practitioner desires to submit. In *General Medical Council v. Spackman*, [1943] A.C. 627, a practitioner was cited as co-respondent in a divorce petition. He was found by the Divorce Court to have committed adultery with the respondent, who had been one of his patients. A decree was granted and damages awarded to the husband. The practitioner was subsequently summoned before the General Medical Council to answer an allegation of infamous conduct in a professional respect. At the meeting he sought to call evidence which had not been tendered in the Divorce Court, in order to challenge the correctness of the judge's conclusions on the question of adultery. The General Medical Council refused to allow him to do so and accepted the decree nisi as proof of adultery. They ordered his name to be erased from the register. The House of Lords held that the Council was bound to hear any evidence

tribunal had acted within its jurisdiction. There must, he said, be an allegation of infamous conduct before the Council could act at all in the matter.<sup>5</sup> This question of jurisdiction is obviously one which depends on the circumstances of each case; and in particular on the terms of the enabling instrument under which the tribunal derives its power, such as an Act of Parliament, or the rules of a voluntary society, or the clauses of a charter.

The other condition which is laid down by the courts for the conduct of judicial proceedings by domestic tribunals is that the members of the adjudicating body must be free from certain forms of bias arising from interest. We have already discussed in an earlier chapter the question of bias in regard to the performance of judicial functions by courts of law,<sup>6</sup> and it seems clear that similar considerations apply to domestic tribunals.

A case in which a patent agent was concerned illustrates this principle in its application to a domestic tribunal. The Admiralty complained to the Chartered Institute of Patent Agents that a certain member (the plaintiff) had disclosed details of a secret invention, and the Council of the Institute thereupon referred the matter to its discipline committee as a question involving 'disgraceful professional conduct'. The Council later applied to the Board of Trade<sup>7</sup> (under some old rules) to secure erasure of the plaintiff's name from the register of Patent Agents, and when this failed they proceeded to act under the terms of their own charter, whereby a person was liable to expulsion from membership of the Institute for

tendered by the practitioner. They might treat the decree in the divorce petition as *prima facie* evidence of adultery, but to regard it as conclusive amounted to a failure to make 'due inquiry' as required by the statute. The House of Lords therefore upheld the decision of the Court of Appeal to grant *certiorari*.

As to the subsequent proceedings before the General Medical Council, see *The Times* newspaper, March 4, 1944.

<sup>5</sup> *Leeson v. General Council of Medical Education* (1889), 43 Ch.D. 366.

<sup>6</sup> See Chapter 2.

<sup>7</sup> Under rule 19 of the *Register of Patent Agents' Rules*, 1909.



an act or default discreditable to a patent agent. The Council which took action in this connection was composed of members who had taken an active part in the earlier proceedings with the Board of Trade. The plaintiff was expelled from the Institute, but the courts subsequently declared the expulsion invalid on the ground of bias. 'Each member of the Council', said Mr. Justice Eve, 'in adjudicating on a complaint is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. If he has a bias which rendered him otherwise than an impartial judge he is disqualified from performing that duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify, although in fact no bias exists.'<sup>8</sup>

But it appears that the learned judge, in speaking of 'the unbiased and impartial mind' which the members of a tribunal are required to bring to their task, was referring mainly to those more obvious and tangible forms of impartiality, such as freedom from financial interest in the controversy, the prohibition against a person acting both as an accuser and as a judge, and so forth, which are required of all adjudicators and which we have discussed in an earlier chapter.<sup>9</sup> He cannot have been referring to any of the more subtle and less tangible psychological attributes of impartiality, for the rule is that, providing the members of a domestic tribunal do not infringe the simple provisions relating to natural justice which have been referred to above, and provided they keep within their jurisdiction, they are, speaking

<sup>8</sup> *Law v. Chartered Institute of Patent Agents*, [1919] 2 Ch. 276.

<sup>9</sup> See Chapter 2.

generally, free to arrive at whatever decision they choose. The court will not interfere, no matter how prejudiced mentally the tribunal's point of view may be, or how narrow its reasoning, or how inequitable the result. It has been laid down again and again that the decisions of domestic tribunals will not be reviewed by the courts, unless the rules or constitution or conditions of membership of the constituent body have not been followed by the tribunal, or unless the formal requirements of which we have already spoken have been departed from, or some obvious form of malice or corruption manifested by the members. The deliberations of the tribunal, and the resulting determination, are normally immune from investigation.

The freedom which is thus given to a domestic tribunal to mete out justice according to its own lights, and subject to no external control, is a fact which confers great power on these bodies in the exercise of their judicial functions. The courts have confirmed the authority of such tribunals on many occasions. A century ago a case came before the courts in which the Crown sought to compel the Bishop of London to 'approve and license' (as required by the Act of Uniformity) a clerk chosen by the inhabitants of the parish of St. Bartholomew in London to fill an endowed lectureship at the parish church. It was held by the courts that no mandamus would lie to compel the Bishop to license a candidate of whom he did not in his own conscience approve, no matter how unreasonably his conscience might work in matters of this kind. The court, in short, would not 'approve' for him.<sup>1</sup>

A similar power of unlimited discretion was declared by the courts to be possessed by the directors of a joint-stock company engaged in manufacturing a well-known brand of china, who had power under the articles of

<sup>1</sup> *R. v. Bishop of London* (1812), 15 East 117.

association to refuse to register a transfer of shares where it was not proved to their satisfaction that 'the proposed transferee is a responsible person' or 'a desirable person to admit to membership'. The court held that, in the absence of evidence that the directors had not acted bona fide in refusing to register a transfer, a refusal on their part to regard a person as desirable or responsible could not be questioned.<sup>3</sup>

#### VOCATIONAL ORGANISATIONS

No less conclusive are the powers of determination possessed by the domestic tribunals of vocational organisations. Thus, if a medical practitioner is, after due inquiry, judged by the General Council of Medical Education and Registration to have been guilty of 'infamous conduct in any professional respect', and the registrar has been directed to erase his name from the register,<sup>4</sup> the court will neither inquire into the matter nor interfere with the decision.<sup>4</sup> Yet action of this kind will often spell economic ruin and professional ostracism for a man whose only sin may have been the adoption of scientific ideas antithetic to those of his more backward colleagues.

A person who is not a legally qualified medical practitioner may, however, continue to practise as a doctor subject only to one or two legal disabilities, such as being unable to sue for his fees or sign a death certificate. But in the case of certain occupations, new offences have

<sup>2</sup> *Re Coalport China Co.*, [1895] 2 Ch. 404.

<sup>3</sup> 21 & 22 Vict. c. 90, s. 29: 'If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall, after due enquiry, be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register.'

<sup>4</sup> *Ex p. La Mert* (1863), 1 B. & S. 582; *Allbutt v. General Council, etc.* (1889), 23 Q.B.D. 400. On the question of due inquiry, see *General Medical Council v. Spackman*, [1913] A.C. 627, *ante*, p. 230, footnote 4.

been created on the criminal side of the law, liability to punishment in respect of which is controlled by the professional association governing the vocation. Thus, the Patents, Designs and Trade Marks Act prohibits a person from describing himself as a patent agent unless he is registered as such in the manner laid down, and a fine is imposed as a penalty. Here, as Lord Herschell, L.C., pointed out, for the first time a new offence is created—the offence of practising as a patent agent without being on a register which is largely controlled by the profession.<sup>5</sup>

There is a growing tendency for Parliament to enact legislation recognising professions and establishing a representative organ for regulating the conditions of entry, qualifications and conduct of practising members. The usual method of enforcing discipline is by a domestic tribunal.

Thus, the architect's profession was dealt with on these lines in 1931. The Architects (Registration) Act, 1931, provides for the establishment of an architects' registration council with the duty of maintaining a register of architects.<sup>6</sup> The council is empowered to remove from the register the name of anyone who is convicted of a criminal offence or who is held to have been guilty of 'conduct disgraceful to him in his capacity as an architect'. A discipline committee is appointed for the purpose of inquiring into and reporting to the council on any case in which disgraceful conduct is alleged. The committee consists of eight members, of whom one is nominated by the Minister of Works, one by the Minister of Health, two by the President of the Law

<sup>5</sup> *Institute of Patent Agents v. Lockwood*, [1894] A.C. 317, Lord Herschell, L.C., at p. 361.

<sup>6</sup> As to the conditions of registration, see sections 3 and 6; also the Architects Registration Act, 1938, which sets up a tribunal of appeal against refusal to re-register.

Society, and four by the council from among registered architects.<sup>7</sup>

Any person who is aggrieved by the removal of his name from the register or by a decision of the council that he is disqualified from registration may within three months appeal to the High Court. On any such appeal the Court's decision is final.<sup>8</sup> This is an important safeguard in disciplinary cases which we may hope will be adopted in similar legislation concerning professional and vocational organisations. The proceedings of the council in regard to admissions to the register are, however, at least as important as those relating to removal therefrom, and here, too, it is desirable that both Parliament and the courts should keep a watchful eye on the activities of vocational and professional organisations of this type.<sup>9</sup> The establishment of a special tribunal of appeal against refusal to admit is a step in the right direction, but no guarantee against arbitrary action.<sup>9</sup>

A jurisdiction of a most drastic nature is possessed by the committee of the London Stock Exchange over its members, who are elected periodically by the committee. During the war of 1914-18 a certain naturalised British subject of German origin with a very good record as a British citizen was not re-elected to the Stock Exchange, of which he was a member—an act equivalent to expulsion. He brought an action against the committee of the Stock Exchange, who are responsible for the election of members, and who had decided to exclude practically all members who were naturalised British subjects of German origin. The House of Lords decided that the court had no jurisdiction to interfere with the decision, as the committee had bona fide exercised the discretion conferred

<sup>7</sup> Architects (Registration) Act, 1931, s. 7.

<sup>8</sup> *Cheyne v. Architects' Registration Council*, [1943] S.C. 468.

<sup>9</sup> *R. v. Architects' Registration Tribunal, ex p. Jaggard* (1945), 61 T.L.R. 44<sup>n</sup>.

on them by the deed of settlement and the rules, and had not been shown to have acted arbitrarily or capriciously.<sup>1</sup>

In another Stock Exchange case of a similar character, the learned Chancery judge observed that where power is confided to a tribunal the discretion that the tribunal may exercise must be used 'according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular'.<sup>2</sup> But it is difficult to feel that this statement is in practice anything more than a pious hope of what ought to be rather than a declaration of what is, when we recall the fact that the decisions of domestic tribunals are, in effect, not subject to review except where the principles of 'natural justice' have been violated. A member of the Court of Appeal, in the leading case of *Leeson v. General Council of Medical Education*,<sup>3</sup> said that if it was once established that a complaint made before the council was one in respect of which they possessed jurisdiction, then the court 'ought not to look at the evidence or in any way consider whether they have arrived at a right conclusion'.

A domestic tribunal, moreover, is under no obligation to give reasons for its decisions<sup>4</sup>; and it is difficult to understand how it can be known whether the members are acting according to 'private opinion' or according 'to the rules of reason and justice', when all that they are required to do is merely to announce their conclusion without explaining the mental processes or the chain of reasoning which have led up to it. In a case similar to the one we have mentioned above, where company directors armed with power to approve persons desirous of

<sup>1</sup> *Weinberger v. Inglis*, [1919] A.C. 606.

<sup>2</sup> *Cassel v. Inglis*, [1916] 2 Ch. 211, Astbury, J.

<sup>3</sup> (1890), 43 Ch.D. 366.

<sup>4</sup> *Cassel v. Inglis*, [1916] 2 Ch. 211.

becoming shareholders had refused to transfer shares to a certain individual, a learned lord justice said he could not conceive that anyone could accept office as a director, or exercise the power entrusted to him, if he were liable to be called upon to say what were the particular reasons or the particular motive which had influenced him in concluding that a person was not eligible as a shareholder. 'The conclusion of the directors', he remarked, 'in the absence of any suggestion or evidence to the contrary, we must, of course, take to be a bona fide conclusion on their part that, for some reason or other connected with the interests of the company, they did not think it fit to recognise that gentleman as a transferee.'<sup>5</sup> He added that the directors were well advised in not permitting themselves to be interrogated as to what particular reasons they might have for personally objecting to the individual concerned.

#### AN ABSENCE OF CONTROL

It will be seen from this that although the statement is often made by judges that domestic tribunals or persons given power to make decisions affecting other persons must act honestly and in good faith, in practice this dictum does not mean much more than that if malice or corrupt motives can be *proved*, the decision will be declared void and set aside.<sup>6</sup> But otherwise the justice or correctness of the decision will not be questioned or even investigated. The tribunal or authority is presumed to have acted bona fide in the absence of proof to the contrary, and since no reasons for the decision are required, a complainant is placed at an enormous disadvantage if he wishes to get a decision reviewed by the courts, for the burden of proof falls on him, and nothing is harder to prove than corrupt motive. We do not think, therefore, that the counsels of perfection which have been

<sup>5</sup> *Re Gresham Life Assurance Society, ex p. Penny* (1871), L.R. 8 Ch. 446.

<sup>6</sup> *Leeson v. General Council of Medical Education* (1890), 43 Ch.D. 366.

laid down by the courts as to the manner in which domestic tribunals should perform their judicial duties constitute a serious modification of the general rule that, apart from questions of bias, jurisdiction and natural justice, the deliberations and decisions of domestic tribunals escape all survey by the courts of justice.

Occasionally, it is true, we find that a statutory provision provides that controversies relating to professional conduct shall be subject to review by the courts of law on appeal instead of being finally determined by a domestic tribunal. Thus, in the case of the solicitor's profession, admission is granted by the Master of the Rolls on the production of a certificate from the Law Society to the effect that the applicant has passed his final examinations and fulfilled other specified conditions; and practising certificates are then issued by the society acting in the capacity of Registrar of Solicitors. If a complaint of improper conduct is made against a solicitor, an inquiry is conducted by a disciplinary committee consisting of past and present members of the council of the Law Society nominated by the Master of the Rolls. If a *prima facie* case is not made out, the committee does not proceed further with the matter; but if the complaint warrants closer investigation the committee orders a full hearing, which is conducted like the trial of an action, the chairman swearing the witnesses, who are examined and cross-examined in the usual way. The committee has power to strike a solicitor off the rolls, or to suspend him from practice, or to fine him any sum not exceeding £500. An appeal lies to the High Court, but the Court has specifically stated that it will not lightly interfere with the discretion of the committee.<sup>7</sup> It is significant of the general trend of events that prior to 1919 the disciplinary

<sup>7</sup> Solicitors Act, 1932, ss. 3-8. As to procedure see Solicitors (Disciplinary Appeals) Rules, 1942, S. R. & O., No. 1832. For examples of the statutory and other grounds which constitute professional misconduct, see Halsbury, *Laws of England* (Halsbury edition), Vol. 31, pp. 294-300.



powers now possessed by the statutory committee were exercised by a divisional court of the King's Bench, to which the committee could only refer a complaint for hearing. In 1919 the Legislature deliberately adopted the view that it was for the Law Society to keep its house in order.<sup>8</sup>

In the case of barristers, the jurisdiction is exercised exclusively by the professional organisations themselves—namely, the Inns of Court, which are unincorporated voluntary associations of great antiquity, unregulated by statute. The judges of the High Court are said to exercise an overriding jurisdiction as visitors; but every High Court judge is a member of the bench or governing body of one of the four Inns of Court, and the courts as such never interfere in cases where barristers are disbarred for misconduct.

The Midwives Act, 1902, which set up a Central Midwives' Board composed of representatives appointed by various medical and nursing associations, local authorities and the Lord President of the Council, with power to strike off the name of a midwife from the roll of midwives and to suspend her from practice, is another case where the court is given a statutory jurisdiction over the right to expel members from their occupation. The Act gives to any woman thinking herself aggrieved by a decision of the Central Midwives' Board a special right of appeal to the High Court of Justice. A similar right of appeal to the High Court has been given to architects whose names have been removed from the register by the discipline committee set up under the Architects (Registration) Acts, 1931 and 1938.<sup>9</sup> But had this right of appeal not been expressly given, the position of midwives and architects would not have differed

<sup>8</sup> See *Re a Solicitor* (No. 2) (1924), 93 L.J.K.B. 761. For a fairly full description, see 'The Professional Discipline of Solicitors', by the Secretary of the Law Society. *Public Administration*, Vol. xxv, p. 21.

<sup>9</sup> *Ibid.*, pp. 235-6.

materially from that of barristers and doctors, or any other group of persons who are subject, as regards their profession, to the final and conclusive jurisdiction of the vocational association which regulates the occupation.

The limitations which the courts have imposed on their own competence to inquire into the deliberations and decisions of domestic tribunals is echoed in some cases by an analogous inability on the part of the court to compel the tribunal, or rather the functional group of which the tribunal is an organ, to carry out any decision other than the one arrived at by the domestic tribunal itself. Thus, the courts have often been exceptionally anxious to prevent members of trade unions from being expelled or deprived of accrued benefits merely because they have been found guilty by the domestic tribunal of having committed an industrial offence against the union. Hence, where a union has purported to expel a member on that ground, judges of the High Court have frequently granted what is called a declaration of membership, which in effect declares that the plaintiff is still a member of the union. But the Trade Union Acts<sup>1</sup> prevent a member of a trade union which is in restraint of trade from suing the union in a court of law in order to enforce directly, or recover damages for the breach of, any agreement for the application of the funds of the union to provide benefits to members. The result is that the most that the court can do, when it wishes to set aside a decision of this kind made by the domestic tribunal of a trade union, is to declare that a workman remains a member of the union and still stands possessed of rights which are usually legally unenforceable. The impotence of the courts here is, however, somewhat exceptional in that it is determined by statute, though the statute in this connection merely embodies disabilities which existed at common law.

<sup>1</sup> Trade Union Act, 1871, s. 4.

Sir Frederick Pollock suggests that the decisions of domestic tribunals must be arrived at with a view to the common interest of the society or institution concerned<sup>3</sup>; but since it is the tribunal itself which determines what the common interest of the institution demands, it can scarcely be said that this carries the matter very much farther, or affords in practice any serious check to the power of the tribunal.

The ability which is possessed by administrative tribunals to regulate their own procedure, and to adopt any method which may suit them for the conduct of their judicial business, extends equally to domestic tribunals. It has been openly declared by the Court of Appeal that a body such as the General Medical Council is not in a position to receive anything which could be regarded by a lawyer as evidence, but can only consider statements made by each side in support of the case before them.<sup>4</sup> Varying opinions on this matter have been expressed in the House of Lords.<sup>5</sup>

#### THE MARKETING BOARD MOVEMENT

In 1930, a new current appeared in the legislative stream which made itself felt with increasing force in the ensuing years. This consisted of statutes authorising the setting up of organisations representing the producers or distributors of a particular product for the purpose of regulating its production, sale, quality, methods of disposal, and so forth. The Coal Mines Act, 1930, the Agricultural Marketing Acts, 1931 and 1933, the Herring Industry Acts, 1935 and 1938, the Sea Fish Industry Act, 1938, and the Bacon Industry Act, 1938, are all based on the principle of establishing statutory associations of the cartel

<sup>3</sup> *Law of Torts*, pp. 125-126.

<sup>4</sup> *Ileson v. General Council of Medical Education* (1890), 43 Ch.D. 366, Cotton, L.J.

<sup>5</sup> *General Medical Council v. Spackman*, [1913] A.C., Viscount Simon, L.C., at pp. 631 and 637; Lord Atkin at p. 638; Lord Wright at p. 640.

type, armed with price-fixing and output-restricting powers of a monopolistic kind in respect of a particular product. I have elsewhere described this movement as a return to the Gild.<sup>6</sup>

This legislation is of considerable economic, constitutional and juridical importance. Here we are concerned only with the legal aspect, and, in particular, with the disciplinary powers conferred on the various associations over their members.

The Coal Mines Act, 1930, was the pioneer measure for the statutory regulation of an industry by means of organs representing the undertakings engaged in it. We need not, however, trouble to consider this Act in view of the fact that the system which it introduced has been replaced by public ownership operating through the National Coal Board.

Agriculture was the next sphere of application. Under the Agricultural Marketing Acts marketing schemes were set up for dealing with pigs, bacon, potatoes, hops and milk. The aim was to enable agricultural producers to obtain the benefits of large-scale co-operative organisation, compulsory restriction of output and minimum or fixed prices. Where the producers of a particular agricultural commodity wish to obtain the benefits of the Acts, a scheme is prepared on their behalf embodying certain compulsory provisions, together with such other optional powers as they consider desirable. The scheme always provides for the establishment of a marketing board composed of persons elected by the producers from among themselves with one or two additional members from outside.

The principal powers which a board may acquire may be summarised as follows:—

- (1) Power to purchase all the regulated commodity,

<sup>6</sup> W. A. Robson (Ed.), *Public Enterprise*, p. 395: and especially Chap. 8, 'The Agricultural Marketing Boards', by W. H. Jones.

and to sell, pack, grade, store, adapt for sale, insure, advertise and transport it.

- (2) Power to require the producers to sell the product in whole or part through the board.
- (3) Power to determine the price at, below or above which, and the terms on which, and the persons to or through whom, the product may be sold.
- (4) Power to buy and to sell or hire to producers anything they require to produce, process or sell the commodity.

The powers which the several boards have acquired vary as between the different schemes. When a scheme has been prepared it is submitted to the Minister of Agriculture, who hears objections and may order a public inquiry. He may approve the scheme as submitted, or subject to modifications, and it is then laid before Parliament. If Parliament passes a positive resolution in favour of it, the Minister then makes an order putting the scheme into effect.<sup>7</sup> Similar methods of procedure and of organisation are to be found in the legislation dealing with the fishing industry. A two-thirds majority in favour of the scheme is required before it can come into operation, but once this is obtained the provisions of a scheme have the force of law and are binding on all producers in the industry concerned, whether they voted for or against the proposal.

It would be impossible for a marketing board or similar body to enforce a drastic scheme of this kind, directly affecting the business interests of every farmer, dairyman, bacon curer and fisherman, without stringent sanctions designed not only to punish the producer who fails to comply with the scheme, but to deter others from doing so. It is, moreover, necessary also to protect producers who are obeying the regulations of the board

<sup>7</sup> R. E. Cushman, *The Independent Regulatory Commissions*, pp. 550-571; W. H. Jones, *op cit.*

from losses caused by members failing to pay their proper contributions to the common fund, or in some other way not complying with the obligations falling on all producers of the regulated commodity.

The Agricultural Marketing Act, 1931,<sup>8</sup> requires every scheme to prohibit sales to any producer who is not either registered or exempt from registration. A scheme must also contain provisions obliging the marketing board to impose on, and recover from, any registered producer who contravenes any of its provisions such monetary penalties as the scheme may specify. The Act makes certain offences against the schemes criminal offences punishable on summary conviction or on indictment. For example, an unauthorised sale of the regulated product by a producer is to be dealt with in this manner, and the jurisdiction of the marketing board is excluded in respect of such offences.

The sanctions contained in the several schemes vary in detail, but in general they conform to a common pattern. Broadly, they recognise two classes of offence for which the boards are required to impose penalties. First, those involving a failure to furnish information. Thus, where a registered producer omits to furnish the board with the information which they are entitled to demand, or knowingly furnishes false statements, or otherwise obstructs the board's officers in their quest for knowledge, he is liable to be fined by the board. The maximum penalty is in most schemes £20 for each offence. The second class of offence consists of contraventions of the specific provisions of a scheme. For example, under the English milk marketing scheme it is an offence to sell milk by wholesale except in accordance with a contract prescribed by and registered with the board; or for a producer to sell milk by retail at less than the prescribed

<sup>8</sup> Section 6

minimum price. The maximum penalty for offences of this class varies. It is usually rather high, since a producer who disregards regulations of this kind may derive considerable benefit from so doing. Hence, in many schemes the maximum penalty is £100, plus half the price at which the product was sold.<sup>9</sup>

In addition to the power which all boards possess to impose fines on their members, some boards exercise a further disciplinary power by means of licences, which can be revoked or suspended. A licence may lay down conditions regarding the price at which the regulated commodity may be sold and other requirements to be observed by the producer. These conditions are not prescribed by statute and do not appear in the marketing schemes themselves, but they are legally valid and enforceable both by monetary penalties and by the additional or alternative method of revoking or suspending the licence. Monetary penalties imposed by the boards are debts due to the board which are recoverable by proceedings in the courts.

Here, then, is a new type of jurisdiction conferred on these modern statutory gilds. The marketing boards differ from the voluntary associations described in the preceding pages in several respects. First, they are corporate bodies enjoying full juridical personality. Second, they have been authorised by the Legislature, promoted and created by Ministers and clothed with powers derived from statute. Third, their legal powers are far more extensive. A trade union may fine a member who has infringed its rules, but it cannot recover

<sup>9</sup> See the following schemes: The Milk Marketing Scheme (Approval) Order, 1933, S. R. & O., No. 789; the Hops Marketing Scheme, 1932, as amended by the Hops Marketing Scheme (Amendment) Order, 1934, S. R. & O., No. 841; the Bacon Marketing Scheme (Approval) Order, 1933, S. R. & O., No. 683; the Pigs Marketing Scheme (Approval) Order, 1933, S. R. & O., No. 686; the Potato Marketing Scheme (Approval) Order, 1933, S. R. & O., No. 1186.

the penalty in the courts.<sup>1</sup> A trade association may impose a code of conduct on its members or even on outside persons, but it must rely on the economic pressure which the association can exert to secure compliance with its provisions, whereas a marketing board can exercise a direct sanction through its penal powers and by means of a licensing system. A club or any other voluntary organisation can exclude whom it pleases and may expel members who fail to observe the common rules, but a marketing board has a comprehensive membership consisting of the entire body of producers over which it retains a permanent grip. A dealer who breaks the rules of a well-organised trade association may expose himself to dire action through the operation of the stop list, and he may be willing to pay money to the association as an alternative, but he is, at any rate, not liable to be brought before the criminal courts and fined. But a producer of milk or one of the other products regulated by a marketing scheme may easily find himself in this position.

#### THE FALMOUTH COMMITTEE

In 1939 a committee was set up by the Treasury, under the chairmanship of Lord Falmouth, 'to inquire into the present arrangements for the imposition and recovery of penalties for contravention of schemes established under statute for the organisation of agriculture and other industries, to consider whether any modifications are desirable and practicable and to make recommendations'.

The committee's report contains some interesting figures as to the number of penalties imposed. From the inception of the schemes to the middle of 1938, a period of about five years in most instances, the English Milk Marketing Board had imposed 1,739 penalties, amounting in the aggregate to over £45,000. The corresponding

<sup>1</sup> By virtue of s. 4 of the Trade Union Act, 1871.



milk board in Scotland had also imposed a fairly large number of penalties. The Potato Marketing Board had imposed 1,568 fines, amounting in all to more than £5,000. The other boards had not exercised their penal powers to any considerable extent.<sup>2</sup>

The boards were criticised before the committee on two general grounds of principle. First, it was said that the system is contrary to the rule of law which has hitherto prevailed in this country, and which is regarded as a cornerstone of the British Constitution. Dicey was invoked in support of the contention that no one can be punished or made to suffer in his person or pocket except on proof of a clear breach of the law before the ordinary courts. Second, it was said that the boards act as prosecutor, jury and judge in their own cause.<sup>3</sup> Neither of these criticisms was put forward by farmers, the vast majority of whom testified in favour of the system.<sup>4</sup>

In a delightful footnote, the committee recorded its awareness that the accuracy of Professor Dicey's statement 'had not passed unchallenged'. In any event, so much legislative change has taken place since Dicey's day that to condemn the Agricultural Marketing Acts because they conflict with his statement was, in the committee's view, 'an academic condemnation and not in accord with modern ideas and practice'.<sup>5</sup>

The second ground of criticism could with equal force be directed against the entire mass of vocational associations, athletic and social clubs, learned and professional bodies, trade unions and trade associations of all kinds, which maintain discipline among their members by domestic tribunals. The committee was at pains to

<sup>2</sup> Report of the Departmental Committee on the Imposition of Penalties, 1939, Cmd. 5980, p. 12.

<sup>3</sup> Paragraphs 54-55.

<sup>4</sup> Paragraph 103.

<sup>5</sup> Paragraph 57.

explain the lengths to which the principle of self-regulation had been permitted to these institutions, doubtless because they wanted to present the subject-matter of their inquiry in its proper setting and also, perhaps, because they were convinced that in general the principle is a correct one.

The disciplinary system embodied in the Agricultural Marketing Acts and similar legislation is not, the committee observed, 'a radical departure from established practice in co-operative organisation in this country'. Furthermore, where an industry is organised in schemes similar to those under review, 'it is reasonable that the imposition of penalties should be dealt with, when possible, by domestic tribunals',<sup>6</sup> subject to certain safeguards which the committee recommended. The knowledge that an industry can manage its own affairs, including the administration of discipline, declared the committee, 'brings a very desirable sense of responsibility and unity to those concerned'.<sup>7</sup>

The committee explicitly rejected the proposal which some witnesses had made to transfer the disciplinary powers of the boards to the courts of summary jurisdiction. The contravention of a marketing scheme ought not, they thought, to be regarded as a breach of the ordinary law, since it is not an offence against the community, but rather as an infringement of a code of rules drawn up by a class of individuals primarily in their own trade interests.<sup>8</sup> This remark might be regarded by some critics as a sweeping condemnation of the legislation from the standpoint of the general public, though it clearly contains a great deal of truth. The committee also thought that transfer to the courts would have serious practical disadvantages with no corresponding benefits to producers. It would add substantially to the difficulties and expense

<sup>6</sup> Paragraph 67.

<sup>7</sup> Paragraph 221.

<sup>8</sup> Paragraph 97.

of the boards in enforcing the schemes. Matters of common knowledge to the practical farmers, dairymen, fishermen and other practical men who compose the boards would have to be strictly proved in the courts by the formal rules of evidence. It would also be necessary, observed the committee, for the courts, 'not only to have some knowledge of agriculture, but also to understand the purpose and provisions of the schemes',<sup>9</sup> neither of which conditions is likely to be satisfied by the courts of summary jurisdiction. In consequence, the producer, especially the small man, might well be in a worse position before the magistrates or the justices than before a marketing board. Furthermore, the consistent policies of each board in regard to penalties would disappear in face of the diverse outlook of numerous subordinate criminal courts, for different courts might impose different penalties for similar offences.<sup>1</sup>

For these reasons the committee were convinced that the enforcement of discipline by a domestic tribunal is the right principle, and that the jurisdiction of the marketing boards over their members should continue. The greater part of their report was therefore devoted to considering ways of improving the organisation, practice and procedure of the boards for this purpose.

Their most important proposal in regard to structure was a recommendation that in place of the full marketing board, which had hitherto exercised disciplinary functions, a small tribunal should be constituted within each board to consist of not more than five members. This tribunal would be a committee of the board. It would be presided over by an independent chairman possessing legal qualifications and experience nominated for that purpose by the appropriate Minister. A panel of chairmen might be drawn up for each board to ensure that a qualified

<sup>9</sup> Paragraph 98.

<sup>1</sup> Paragraphs 102-103.

chairman was always available to serve on the disciplinary tribunal.<sup>2</sup> The remaining personnel of the tribunal would be selected from ordinary members of the board.

This proposal is a good one, and will, it is hoped, be adopted by the marketing boards and any future organs created on similar lines. It follows the principle, recommended elsewhere in this book, that when judicial functions are conferred on an administrative body they should always be allocated to a definite tribunal.<sup>3</sup> This principle should be applied to domestic tribunals no less than to administrative tribunals.

I proposed to the committee that the disciplinary powers of all the marketing boards and similar bodies should be exercised by a single Marketing Boards Tribunal, consisting of a chairman with legal qualifications sitting with seven or eight members representing the various boards. My object in broadening the jurisdiction was, first, to provide a tribunal which would possess a wider outlook than that of any particular board; second, to ensure consistency of decision as between the several boards; third, to regularise the procedure and to provide some of the normal safeguards of justice. For this purpose a registrar would be provided by the Minister of Agriculture and Fisheries with legal qualifications to assist the tribunal in formulating its procedure and practice on regular lines. The committee were unable to accept this suggestion because they objected on general grounds to the creation of new judicial bodies which are neither courts of law nor domestic tribunals. Parliament certainly does not share this objection, as the large number of administrative tribunals established by recent legislation abundantly shows.

Under the existing Acts, any producer on whom a penalty is imposed has a right to apply for arbitration.

<sup>2</sup> Paragraph 110.

<sup>3</sup> See p. 503.

He can either appear before the marketing board and then appeal to an arbitrator if their decision is unfavourable to him, or he can refrain from appearing before the board in answer to the charge and go direct to an arbitrator. This right of arbitration is used to only a slight extent,<sup>4</sup> and it has many disadvantages. Thus, an arbitrator's decision is not binding in subsequent arbitrations, nor is it usually published. For some reason which is not apparent, the committee favoured the continuance of the present right of appeal to an arbitrator from any decision of a disciplinary tribunal. They recommended, in addition, that an appeal on a question of law should lie to the High Court on a case stated from a penal decision of a marketing board, but that apart from this the courts should have no power to re-open or review the proceedings of a board.<sup>5</sup>

The committee dealt with many other matters in its report, such as the desirability of disciplinary committees sitting in provincial centres, where possible; the payment of the costs of a producer accused of an offence by the board; procedure; the conduct of regional officers of the Milk Marketing Board; the question of enabling boards to recover losses to their funds as distinct from penalties for non-compliance with a scheme; the peculiar relations between the Bacon Development Board and the marketing boards for pigs and bacon; and the need for special disciplinary authorities in connection with the Herring Industry scheme.<sup>6</sup> But all these topics were matters of detail which we need not consider here.

The broad fact which resulted from this inquiry was that domestic tribunals in their most extreme form had run the gauntlet of an impartial investigation and had emerged successfully from the ordeal. They were now

<sup>4</sup> The Committee stated that only 220 cases had gone to arbitration in five years out of 3,325 penalties, para. 50.

<sup>5</sup> Paragraphs 138-139, 141-142, 159-160.

<sup>6</sup> Paragraphs 85-90, 113, 115, 131-133, 213.

stamped with the seal of official approval as bodies which could properly be entrusted with the task of enforcing obedience to a code of economic conduct or methods of dealing imposed on an entire trade or industry by a body representing those engaged in it. Their disciplinary powers, derived from statutory enactment and supported by drastic penal sanctions, were regarded with favour as the proper method of endowing a modern gild with the conditions needed for its effective existence.

The economic, social and political implications of the cartel movement represented by the marketing boards were not discussed by the Falmouth Committee, nor does the report give any indication that they were apprehended. Any inquiry into the fundamental assumptions on which the boards are based was dismissed, or rather excluded, by airy statements about self-government in industry bringing a desirable sense of responsibility and unity. The transition from a voluntary unincorporated organisation like a trade union or a trade association, dependent on contractual relations between the members, to a corporate organ, based on statute and created by ministerial order, was passed lightly over with the comment that no radical departure had been made from the established practice.

The report of the Falmouth Committee was published in April, 1939, and the war intervened before the Minister of Agriculture could announce his decisions on its recommendations. On the establishment of the Ministry of Food early in the war, the Government decided to suspend the operations of the majority of the marketing boards. Only the Hops Marketing Scheme and a part of the Milk Marketing Scheme continued to operate in a modified form. The schemes have remained in suspense and their future has not yet been determined. It is, therefore, impossible to predict the future of the

marketing board movement or of the domestic tribunals which form an essential part of it.

#### CONCLUSION

From what has been said in the foregoing pages, it can be seen that there are in England, apart from the regular courts of justice and the administrative tribunals, a vast number of domestic tribunals exercising an extensive power of decision over a great variety of matters closely affecting the lives of millions of individuals; that the authority of these tribunals within their jurisdiction is recognised by the courts; and that, for the most part, that authority is uncontrolled. In certain exceptional circumstances the courts will interfere, but those circumstances arise only when what may be regarded as the framework within which the proceedings are carried on is abused. Provided that a domestic tribunal follows certain elementary rules, its decision is not subject to review, and the members are protected from civil liability.<sup>7</sup>

<sup>7</sup> *Pollock, op. cit.*

## CHAPTER 5

### THE JUDICIAL MIND

The Psychological Background—The Need for Consistency—The Need for Equality—The Need for Certainty—The Rule of Reason—The Technique of Impartial Thought—The Artificial Reason of the Law—The Exclusion of Imponderables—Judicial Discretion—The Good Judge—Conclusion.

#### THE PSYCHOLOGICAL BACKGROUND

WE have now surveyed a large number of judicial institutions of all kinds, including not only formal courts of law, but also administrative tribunals and the judicial organs of voluntary associations and professional organisations. We have seen that many persons exercise judicial functions besides those who are called judges, and that mere titles are inadequate as a guide for discovering where the judicial function resides.

In 1882, an American judge was quite clear as to what were the essentials required 'to administer justice judicially'. All that was wanted, he said, was a judge attended by a clerk, a sheriff and a marshal; a right to compel attendance before the court; two parties to a controversy; a wrong done or threatened, or a right withheld; a hearing or trial; and then judgment followed by such enforcement as might be necessary to enable the courts to 'subserve the ends of their creation'.<sup>1</sup>

But we know today that judicial institutions do not by themselves suffice to produce justice. What is called the administration of justice requires not merely the establishment of organs of justice, such as courts of law or other tribunals, but also, and perhaps more importantly,

<sup>1</sup> *Fuller v. County of Colfax, Circuit Court of U.S.A., District of Nebraska* (1882), 14 Fed. 177.



that the matters to be adjudicated upon shall be decided by a particular process. That process is the judicial process. It consists in the application of a body of rules or principles by the technique of a special method of thought, and in the presence of certain psychological elements. In the *Arlidge Case* Lord Haldane spoke of the need for officials to 'act judicially', to conduct themselves with a sense of responsibility, and to carry out their duties 'fairly and judicially'; Lord Moulton referred to the necessity for preserving 'a judicial temper' and of treating appeals 'in a judicial spirit'; but none of the learned law lords made any attempt to explain what these phrases mean in terms of law or of logic or of psychology. Sir Claud Schuster, a former permanent secretary to the Lord Chancellor, remarked in his evidence to the Royal Commission on Local Government that there is a great deal of administration where the administrator is bound to exercise, or ought to exercise, a judicial mind, although what he is doing is administrative and not judicial. 'If that can once be grasped', he added, 'none of the rest matters.' But although Sir Claud Schuster had himself grasped the importance of the judicial mind, he followed the example of the learned law lords in making no attempt to analyse or describe its nature.<sup>2</sup>

In the following pages I shall endeavour to discover what is in fact meant by the judicial spirit. With that object, I shall analyse the process which takes place when a judge in a court of law decides a controversy brought before him. We can then see to what extent the underlying conceptions have been applied by administrators and others engaged in performing judicial functions; and we shall in consequence be in a better position to evaluate the body of administrative justice which has recently grown up in England, and which we have described in the

<sup>2</sup> Royal Commission on Local Government, 1923, Minutes of Evidence, Part 2, Q. 6457, p. 429.

foregoing pages. We cannot intelligently assess the worth of new constitutional machinery for administering justice unless and until we know whether or not that machinery results in the fundamental elements of the judicial process finding expression.

In Xenophon's *Cyropædia*, Astyages asks Cyrus to give an account of his last lesson. Cyrus answers thus: 'One of the boys of our school had a coat too small for him and gave it to one of his companions, a little smaller than himself, and forcibly took in exchange the latter's coat, which was too large. The preceptor made me judge of the ensuing dispute, and I decided that the matter should be left as it was, since both parties seemed to be better accommodated than before. Upon this the preceptor pointed out to me that I had done wrong, for I had been satisfied with considering the convenience of the thing, whereas I ought first to have considered the justice of it'. This story is said to exemplify the difference between adjudication and administration.<sup>3</sup>

Whether or not that be true, it is clear that the preceptor, when he asked Cyrus to act the part of judge, was calling upon the youth to make a greater effort of mind than that involved in the mere following of his undisciplined impulse. Justice dealt out according to the first impression of the case, what Sir Frederick Pollock calls the 'natural justice' of an Eastern king sitting in the gate,<sup>4</sup> may be just tolerable if the community is small enough for the whole administration of justice to be in the hands of one man whose impulses are fairly consistent, and who possesses an interest in the public welfare; but in more complex circumstances, where the judicial function is distributed among various individuals of divers

<sup>3</sup> Xenophon, *Cyropædia*, Book I (3); see also Bentham, *Theory of Legislation: Principles of the Civil Code*, Vol. I, Chap. 16, Oxford University Press edition. Cf. Roscoe Pound, 'Administrative Application of Legal Standards', 11 *American Bar Association Reports*, 451-456.

<sup>4</sup> Sir F. Pollock, *First Book of Jurisprudence*, p. 42.

other persons within relatively narrow limits. The desire for consistency is strengthened, moreover, when a sense of purpose underlies the class of activities to which it is applied. The Board of Inland Revenue, for example, has power to impose a fine up to £10 as a penalty for not stamping a document within the prescribed time. The revenue authorities are legally unfettered in their decisions, and could, if they desired, inflict the maximum amount for every offence. But in practice they have evolved an elaborate system of graduated penalties varying with the duration of the delay, the amount of duty to be paid, the cause of the omission, and the blameworthiness of the person in default.<sup>10</sup> The guiding purpose underlying the development of a consistent practice in this connection has been a desire to 'make the punishment fit the crime', to imbue defaulters with a sense of justice, and to bring pressure on persons to get their documents stamped within the proper time.

Consistency is not necessarily the same thing as uniformity, and may, indeed, be opposed to it. The idea of uniformity involves the notion of treating alike things which appear superficially to bear a resemblance to one another, regardless of whether they are in fact similar. Undeveloped systems of law are usually marked by the quality of uniformity rather than by that of consistency. Consistency prescribes a reasoned relation, in the first place, between decisions for the same class of case at different points of time; in the second place, between different classes of case at the same point of time; and in the third place, between different classes of case at different points of time. There must be no disparity or conflict of purpose which is offensive to the reason throughout the jurisdiction at any point of time or space.

<sup>10</sup> Sir Josiah Stamp, *Current Problems in Finance and Government*, pp. 60-62.

The act which is a crime on Monday must remain punishable on Tuesday; the rule which is binding in Surrey must apply equally in Northumberland.

It is this desire for consistency that is at the bottom of that respect for precedent which is so marked a feature of English law. The binding authority of past decisions arrived at by the superior courts is really nothing more or less than an endeavour to make the system of law prevailing at any given moment self-consistent in all its parts; and we find that even the House of Lords, which as the highest court in the land is subject to no overruling authority save that of an Act of Parliament, submits voluntarily to be bound by its own decisions.

But the desire that continuity shall prevail in the treatment of disconnected matters is not confined to those who perform judicial functions. A principle of consistency, as Lord Stamp pointed out, enters not only into the procedure of a law court, but also into the administration of a government department. The administration, unlike the Legislature, cannot discriminate between classes. 'Any discretion it has at all has to be exercised as a distinction between cases evenly and smoothly over all classes. Thus you have running down from the top to the bottom this obligation to uniformity or principle of consistency.'<sup>1</sup> One of the great problems in the modern state is, indeed, how to secure consistency in the field of public administration without creating a mass of rules which actually result in a mere wooden uniformity.

Enough has been said to show that of all the elements in the judicial process none is more fundamental than the urge towards consistency, and the tendency towards the formulation of rules and principles which that urge

<sup>1</sup> Sir Josiah Stamp, *Current Problems in Finance and Government*, pp. 56, 59.

produces. The entire study of the law is, in the words of Judge Cardozo, an inquiry into 'the principles of order revealing themselves in uniformities of antecedents and consequents. When the uniformities are sufficiently constant to be the subject of prediction with reasonable certainty, we say that law exists'.<sup>2</sup>

The danger of administrative tribunals is said to lie in the fact that if the members of a tribunal are too closely subordinated to the government of the day they may tend to arrive at decisions which they think may please the particular party in power, regardless of the larger duty which they owe to the principle of consistency. But there is no evidence that up to the present this has occurred in the case of administrative tribunals in England.

The disposition towards consistency is, we might venture to say, one of the deepest urges of the human mind; the whole mass of our scientific knowledge has arisen from a craving to discover a consistency in the nature of things, a series of stable relations between phenomena, on which we can rely. Science, in short, is based on a desire to discover that the universe behaves consistently; and the consistency which marks the judicial attitude is only a special manifestation of that larger consistency which exerts so strong an attraction over the human mind in other departments of life.<sup>3</sup>

Professor John Dewey goes so far as to suggest that the whole mechanism of our thinking is only a reflection on a larger scale of the process by which judgments are formed in the courts.<sup>4</sup> In all spheres of life where we are required to form a judgment, a process takes place similar to the determination of a legal dispute. There is, first, a

<sup>2</sup> B. D. Cardozo, *The Growth of the Law*, pp. 37-38.

<sup>3</sup> This large subject is discussed at length in my book, *Civilisation and the Growth of Law* (Macmillan).

<sup>4</sup> J. Dewey, *How We Think*, pp. 101-102, Chapter on 'Judgment: The Interpretation of Facts'.

controversy, consisting of opposing claims regarding the same objective situation; second, the business of defining and elaborating these claims, and of sifting the facts adduced in support of them; third, a final decision is arrived at. 'The judgment', writes Dewey, 'when formed is a *decision*. This determination not only settles that particular case, but it helps fix a rule or method for deciding similar matters in the future, as the sentence of the judge on the bench both terminates that dispute, and also forms a precedent for future decisions. If the interpretation settled upon is not controverted by subsequent events, a presumption is built up in favour of a similar interpretation in other cases. . . . In this way principles of judging are built up; a certain manner of interpretation gets weight, authority.'<sup>3</sup>

If this be a true analysis, as we think it is, of the working of the human mind, the tendency towards consistency lies buried very deep in human nature; and there is little reason to doubt that educated men of any type who are called upon to perform judicial functions will tend to build up a body of principles which will tend to approach consistency, regardless of whether they have the title of judge or the special training of lawyers.

#### THE NEED FOR EQUALITY

No less important than consistency as an attribute of the judicial spirit, and intimately connected with it in some ways, is the tendency towards equality.

Inequality before the law was the principle which prevailed in former ages. There were recognised differences of liability varying with the rank, age and sex of the offender.<sup>6</sup> But the marks of justice according to law in the modern sense are generality and equality.<sup>7</sup> The

<sup>3</sup> *Ibid.* p. 107.

<sup>6</sup> L. T. Hobhouse, *Morals in Evolution*, p. 77. See, as examples, the system of wergilds, or the code of Hammurabi.

<sup>7</sup> Sir F. Pollock, *First Book of Jurisprudence*, pp. 37 *et seq.*

rule of law applies to the whole generality of citizens, and all men are equal before the law. This does not mean that everyone has similar rights, or a right to the same things; but all rights of the same kind are equal as between different individuals.

The judge, we have noted, swears to do right to all manner of men, showing neither favour nor ill-will. This leads to the principle of equality in that when a given set of facts or a particular group of individuals have been thrown into their appropriate legal categories, the judge must then apply to the individuals concerned the law that governs the entire class of objects or persons situated in those circumstances. Here, indeed, we touch the very essence of what is meant by such phrases as 'the impartiality of judges', for the implication of those terms is precisely that the judge shall as far as possible deal with the materials before him by categories, treating equally all the separate items within each category. Every purchaser who has been fraudulently deceived as to the goods which he has bought must be treated alike; there must be no discrimination between them on grounds of religion, or personal attractiveness, or wealth, or nationality, or excellence at golf. All petitioners for divorce must be subjected to the same rules of law; adultery cannot be excused in one respondent because of his laudable war record, or because he and the judge have a mutual friend. This disinterested treatment of each member of a legal category on similar lines, regardless of race, religion, antecedents, physical appearance, intellect, public spirit, or occupation, is the foundation of judicial impartiality. In this sense equality before the law may be said to have a real existence: incidentally, in this sense only, since individuals differ largely as to their legal rights and duties.

In order that equality before the law shall prevail, in the sense mentioned above, the judge is required to

distinguish carefully between facts which are relevant to the issue and those which are immaterial. In the ultimate scheme of things everything is related in some way to everything else; but in this brief life of ours all systems of law postulate a strictly enforced duty of selection which aims at distinguishing the irrelevant from the relevant. A sense of relevance is, indeed, an essential ingredient in the judicial mind.

In the daily procedure of the courts we can observe a continual exclusion from the attention of the judge, of physical, economic, social and moral facts, which are accounted of enormous importance in other departments of life, but which in law have often no significance. A manufacturer of ferro-concrete who treats his wife badly, lies to his children, bullies the servants and cheats at cards, is not on that account placed in a disadvantageous position in regard to a building contract. A woman who is negligently run down by a motor car is not prejudiced in her action for damages because she has squandered her father's fortune, or ruined her husband's life. It is only in regard to conduct directly connected with the actual subject-matter of the dispute that moral considerations may influence the decision, and even then it is by no means always permissible. A judge who, in summing up a criminal charge, invited the jury to consider whether there was anything in the evidence which made the prisoner appear to be 'the sort of person' who would be likely to commit an offence of the kind with which he was charged, was held to have acted improperly, and the conviction was quashed.<sup>3</sup> The basis for this decision was clearly the fact that the judge had not observed the relevance which the judicial mind requires.

<sup>3</sup> *R. v. Marshall*, 18 Cr.App.R. 164. But see *R. v. George Joseph Smith*, [1915] 11 Cr.App.R. 229 (the 'brides in the bath' case) for an interesting application of the Aristotelean doctrine that successive acts make character, and that evidence of the whole series is therefore admissible in judging an isolated event.



The law itself, of course, often draws distinctions based on moral grounds between cases which would otherwise call for equal treatment. A man who bets against his horse winning the Derby ought logically to be treated in the same way as a man who bets against the safety of his own cargo on a ship at sea. But the law regards one as a wager which it will not enforce, and the other as a contract of marine insurance.<sup>9</sup> The judge himself is often called upon to mete out unequal treatment to persons whose cases are indistinguishable save on moral grounds. The equitable jurisdiction of the Chancery judges is based on a whole series of moral axioms, such as 'He who seeks equity must do equity', and 'Who comes for equity must come with clean hands'; and in various other departments of the law moral inequalities are acknowledged to produce legal inequalities.

But nothing in all this touches the dominant fact that inequalities of rank, fame and fortune do not call for inequality of treatment from the judge. Here lies the fundamental difference between the mind which is imbued with the judicial spirit and the unjudicial mind. Three-quarters of the prevailing social discontent arises from the fact that in our economic system a similar equality does not exist. The manufacturer who places his son in charge of the works because he is his son, the politician who secures a well-paid berth in the public service for the friend of a supporter, are not acting in a judicial spirit, for the simple reason they are not taking every man on his merits, regardless of distinctions of an economic or social character.

The conception of equality before the law has implications of a far-reaching character little suspected by some of its most fervent advocates. It leads, by an inevitable logic, not merely to the political equality which we now

<sup>9</sup> Anson, *Contract*, 14th ed., p. 229.

possess, but also to certain kinds of economic equality entirely opposed to existing conditions.

The notion of equality before the law is, like the tendency towards consistency, not confined to judicial proceedings, but extends to many spheres of scientific thought and administrative activity. The very idea of a law involves the conception of a rule or principle which applies universally over a given field. All apples obey the law of gravity, all Andalusian hens follow the Mendelian laws of inheritance, just as all men are conceived of as being subject to the common law of the land.<sup>1</sup>

This is particularly noticeable in the realm of public administration. The whole system of government administration in England today relies on an equality of treatment being meted out, and a potential equality of service being rendered, by the executive agent to all who fall within a particular category. Mr. Sidney Webb (now Lord Passfield) has pointed out that a modern democracy must cater essentially for minorities<sup>2</sup>; but the multiplication of categories does not prevent, and may actually promote, equality of treatment within each category. The law itself often insists upon administrative equality. In the granting of licences to enable motor buses to ply for hire, for example, a local authority was required to act judicially and 'must treat all applicants alike'.<sup>3</sup> This does not mean that all applicants are entitled to obtain licences, but that all are entitled to have the same criteria applied to them: in short, to be taken on their merits, and not disqualified on account of irrelevant considerations.

Civil servants, then, no less than judges, are

<sup>1</sup> Cf. W. A. Robson, *Civilisation and the Growth of Law*.

<sup>2</sup> *The Necessary Basis of Society* (Fabian Society).

<sup>3</sup> *R. v. Brighton Corporation, Ex p. T. Tilling, Ltd.* (1916), 85 L.J.K.B. 1552. The licensing powers of local authorities were transferred to the Area Traffic Commissioners by the Road Traffic Act, 1930 (see *ante*, pp. 95 *et seq.*); the particular instance given in this case remains relevant as an example of general application.

accustomed daily to apply the conception of equality before the law; and there is no reason to believe that administrative officials charged with the performance of judicial functions are nowadays more likely to be lacking in this attribute of the judicial spirit than the holders of judicial office. The tradition of equality was first founded in the courts of law, but it is now no less firmly rooted in the administrative system of the country.

#### THE NEED FOR CERTAINTY

It is not sufficient that the administration of justice should be consistent and equal in its treatment. It is necessary also that it should be certain. We cannot be sure that a principle or rule is being administered either consistently or equally at different times and in different cases, and within different areas, unless we know what the principle is. Hence it comes about that the judicial process requires the formulation and promulgation of a definite body of legal doctrine which can be ascertained by all who are subject to its rule. Sir Frederick Pollock, indeed, regards certainty as one of the distinguishing marks of justice according to law.<sup>4</sup>

The law must be known, or at least ascertainable, not only so as to enable the citizen to observe whether it is being administered consistently and equally, but also in order to enable him to comply with its provisions. The decisions of the judge must contain some measure of predictability. Even where the decision upon a particular set of facts is in doubt, there must be, in Judge Cardozo's words, 'little doubt that the conclusion will be drawn from a stock of known principles and rules which will be treated as invested with legal obligation'.<sup>5</sup> It is this stock of rules and principles which is what we mean for

<sup>4</sup> *First Book of Jurisprudence*, pp. 37 *et seq.*

<sup>5</sup> B. J. Cardozo, *The Growth of the Law*, p. 43.

most purposes by law. And the law must be ascertainable and certain.

So urgent is this need for predictability that administrative tribunals, no less than courts of law, have from time to time found it necessary to formulate the principles on which they intend to proceed. The department in the state of Minnesota concerned in the disposal of public land, and in the determination of controversies in which settlers are involved in connection with public land, has found, for example, that predictability is of great importance in the administration of the land system in the state. Before a settler spends time and money in endeavouring to comply with the public land laws, in order to acquire land, he wants to know exactly what is required of him. 'It is of less importance to him what the requirements are', observes an American writer, 'than that he should know what they are, otherwise he may lose the benefit of all his efforts for failing to comply with a particular requirement which is relatively unimportant, and with which he would have complied if he had known it in advance.'<sup>6</sup> Accordingly the General Land Office, which discharges many judicial functions, has formulated a body of definite rules with which a settler may comply with confidence.

In England there has been a great reluctance on the part of administrative departments to announce publicly the principles which in many cases they have consciously followed for long periods of time, even where such principles have actually been formulated, and are in daily use in the office.

An example of this was the exercise by the Minister of Health of the powers entrusted to him under the Local Government Act, 1888. Under that Act<sup>7</sup> the Minister

<sup>6</sup> H. L. McClintock, 'Public Land Controversies', *Minnesota Law Review*, 7, p. 639.

<sup>7</sup> Section 54

could (until 1926) if he considered it 'desirable' issue a Provisional Order constituting a borough into a county borough, providing it had a population of not less than 50,000. He could also extend the boundaries of existing county boroughs.

This power was of immense importance in English local government, and between 1888 and 1925 enormous quantities of land, population and rateable value were transferred by Provisional Orders from the county councils to the county borough councils—that is, from the great rural authorities to the municipal bodies governing the large towns. The only stipulation laid down by the statute was that the Minister should, as a general rule, hold a public inquiry in the locality, an inquiry which, in practice, was conducted by one of the engineering inspectors of the Ministry, who reported confidentially to the Minister. In the official evidence given before the Royal Commission on Local Government<sup>8</sup> it was revealed that, although the Minister was perfectly free to make any decision he might 'deem expedient', he had actually laid down nine complex conditions which needed to be satisfied before he would make an order. Something analogous to a body of legal principles had been evolved in the department, which was more or less consistently followed by the Minister in making his decisions, although the local authorities had no right in law to enforce its observance. In this way a considerable measure of coherence and continuity was obtained, and the Minister's personal predilections scarcely influenced the matter one way or another.

But although a body of guiding principles had thus been formulated, its existence was not made public. No local authority knew how its application would be regarded, or what tests applied, or whether the tests

<sup>8</sup> Royal Commission on Local Government, 1925, Cmd. 2506, pp. 157 *et seq.*

would be the same for all areas and under all Ministers; nor what conditions it had to satisfy in order to attain county borough status or an extension of boundaries. The whole procedure was severely criticised, a lack of confidence was felt in the methods employed by the engineering inspectors in conducting local inquiries; and the net result was that the entire method, which possessed many advantages, was abolished, and the Provisional Order system swept away in contested applications. It is at least possible that, if the Ministry of Health had published an account of the principles which had been formulated in the department, public opinion in local government circles would have been satisfied and reassured at finding a fairly stable body of rules in existence, and members of county councils would not have been so ready to believe that the Minister was strongly biased in favour of the large cities. It was the uncertainty and unpredictability of the determinations which to no small extent inspired a mistrust that ultimately became so powerful as to destroy the Minister's powers.

One of the weakest features of the whole system of administrative law in England is the disinclination of administrative and domestic tribunals to enunciate clearly for the benefit of the public the principles which they intend to follow, and so enable their proceedings to take on an aspect of certainty which they cannot otherwise assume. Now and again an administrative tribunal will depart from this secretive habit of mind, and come into the open, as it were; but that is rare. The National Health Insurance Commission, for example, at quite an early stage of its existence, announced its belief that the approved societies which were subject to its jurisdiction would welcome 'a series of Reports which may serve as precedents for their guidance in the future, and may at the same time illustrate the principles and procedure which should govern the decision of disputes between

societies and their members'.<sup>9</sup> There is reason to suppose that this declaration of faith was motivated more by a desire to frighten the approved societies into setting their houses in order than by a love of the principle of publicity; but the result was no less desirable. The Ministry of Health followed this up by publishing reports of National Health Insurance appeals and inquiries. The Umpire, who is the appellate tribunal for deciding disputed claims to unemployment insurance benefit, states the principles underlying his determinations, which are published in important cases, and in this way a body of certain law has been built up. But these are exceptional instances, and the great majority of tribunals do not disclose the principles, if any, which in practice they follow.

This secretiveness may no doubt be traced, to some extent, to a desire to avoid laying down a set of rules or principles which would gradually bind the tribunal as strictly as a court of law, and thereby curtail the very freedom which we shall see later is one of the reasons for the tribunal's existence. Secrecy, it may be felt, is necessary to maintain flexibility. The decision of the tribunal emerges *ex cathedra*, and none can question its wisdom, since none can know the considerations which moved the mind of the authority. Every word which lays down a clear and certain principle narrows the future freedom of choice of the tribunal.<sup>1</sup>

Such a view is in the long run a misguided one. What is wanted is a reasonable degree of certainty as to the outlook of the tribunal at any given time and certainty in this sense is not incompatible with growth and change. It may be true, as Learned Hand, J., one of the most

<sup>9</sup> National Health Insurance Commission's Reports of Decisions on Appeals. etc., 1915, Cmd. 7810, p. 3.

<sup>1</sup> My analysis of the cause of departmental secretiveness is supported by Sir Cecil Carr's remark that the Committee on Ministers' Powers, in asking for reasons to be given by Administrative Tribunals 'saw presumably no danger that policy might lose its elasticity under the pressure of volumes of departmental decisions', *Concerning English Administrative Law*, p. 123.

distinguished American judges, has remarked, that administrative tribunals which are charged with the execution of wide legislative purposes 'establish upon them a customary law through the slow accretion of their own precedents'.<sup>2</sup> But the value of such a body of customary law is lost if the knowledge of its character is withheld from the public.

#### THE RULE OF REASON

The growth of certainty in the law is closely associated with not only the drawing up of a body of principles but also with the convention which requires judges in the higher courts to give reasons for their decisions. It is difficult to imagine a body of law possessing the certainty which we nowadays expect growing up in a civilised country if judges were merely to announce their decisions without any statement of the reasons on which they were founded. A striking illustration of this is provided by the experience of the Federal Trade Commission in the United States. This commission is an administrative tribunal set up to secure fair dealing in American business life, and to prevent abuses arising from large-scale monopoly and combination. The commission possesses very large judicial powers, and consists of a large department employing hundreds of lawyers and other expert officials.

The Federal Trade Commission was intended to explore and develop a new field of law centring round the regulation of private business enterprise, and to build up a body of economic jurisprudence. But hitherto the commission has not adopted the practice of giving reasons for its decisions, or explaining why it accepts one contention and rejects another. There is, as a result,<sup>3</sup> a widespread

<sup>2</sup> 'The Speech of Justice', 29 *Harvard Law Review*, p. 620.

<sup>3</sup> *The Federal Trade Commission: A Study in Administrative Law*, pp. 334-335.



complaint that at present it is impossible to discover from the published decisions of the commission what points were decided, and what were the grounds for the decision. It would greatly enhance the justice and quality of the commission's decisions if narrative and descriptive findings were given, containing the grounds for the decision and the reasons for rejecting or accepting arguments.<sup>3a</sup> The Federal Trade Commission was expected to establish precedents for guiding business men and lawyers, but, observes Mr. Henderson, 'I do not see how this important duty can be performed, unless the commission is ready to publish its decisions in such form that the reader can tell what has been decided, and by what reasoning the decision is supported'.<sup>4</sup>

The achievement of certainty is not the only advantage to be obtained from requiring judicial authorities to justify their conclusions by describing the chain of reasoning whereby they are reached.

'Good laws', said Jeremy Bentham, 'are such laws for which good reasons can be given. On the part of a legislator whose wish it is that his laws be good, who thinks they are good, and who knows why he thinks so, a natural object of anxiety will be the communicating the like persuasion to those whom he wishes to see conforming themselves to those rules. On the part of a judge whose wish it is that his decisions be good, who thinks them so, and knows why he thinks them so (it is only in proportion as he knows why he thinks them good that they are likely to be so), an equally natural object of anxiety will be the communicating the like persuasion to all to whose cognisance it may happen to them to present themselves; and more especially to those from whom a more immediate conformity to them is expected.'<sup>5</sup> The giving of reasons, Bentham urges in

<sup>3a</sup> A recommendation to this effect was made by the U.S. Attorney-General's Committee on Administrative Procedure in its Final Report, pp. 136-7. 1941 Washington.

<sup>4</sup> *Ibid.*

<sup>5</sup> Bentham, 'Rationale of Judicial Evidence', *Works*, Vol. 9, p. 357.

this striking passage, serves in effect the important purpose of helping to persuade those who are affected by a decision that it was a right one. There is a lack of conviction, an apparent arbitrariness, about a decision which is unsupported by an account of the reasoning process on which it is based, that is liable to create an impression that the judicial authority making it is an autocratic body uninformed by the judicial spirit. Sir Edward Troup, for many years Permanent Under-Secretary of State in the Home Office, referring to recommendations for mercy made by juries in trials for capital offences, tells us that 'great weight is always given by the Home Secretary to a recommendation by a jury if some sufficient reason be given for it. A mere recommendation without any reason carries much less weight'.<sup>6</sup>

Generally speaking, it is only the judges who sit in the superior courts of law who are required by tradition to state the reasons for their decisions, and administrative authorities and other bodies who perform judicial functions (and even magistrates of the inferior courts) are not under a similar obligation. But this generalisation is subject to exceptions. Thus, the first Royal Commission on Awards to Inventors (1919-1937), although presided over by a judge of the High Court, made a practice of never giving reasons for its recommendations. On the other hand, various administrative authorities exercising judicial functions such as the district auditor are required to explain the reasons which lead to their decisions. Lord Halsbury, when Lord Chancellor, stated definitely that licensing justices, though acting administratively in law, had been given a discretion the limits of which they were not to evade 'by avoiding a plain exposition of the reasons on which they act'.<sup>7</sup>

The obligation to give reasons for the conclusion may

<sup>6</sup> Sir E. Troup, *The Home Office*, p. 68

<sup>7</sup> *Sharp v. Wakefield*, [1891] A.C. 173.

have an important influence not only in persuading those who are affected by the decision that it is a just and reasonable one but also in developing the mental capacity and sense of fairness of the adjudicator. A young man about to take up a minor judicial appointment in a distant colony is said to have been advised by a retired official always to state his conclusions, but never to give reasons in support of them. 'For', said the latter, 'your conclusions will usually be right, but your reasons will usually be wrong.' It is possible that the administration of justice could be carried on without serious trouble in a primitive community by instinctive methods such as were here advocated, but neither a coherent body of law nor the evolution of the type of mind fitted to discharge judicial functions in a progressive and complex society is likely to be developed by shirking the effort of discovering 'good reasons' for what Bentham called 'good decisions'.

Sir Cecil Carr has no doubt that 'reasons ought, of course, to be given for legal decisions. Otherwise students cannot learn the law, practitioners cannot find arguments, parties cannot feel that their cases have had serious attention, and Courts of Appeal have nothing to upset or confirm'.<sup>8</sup> He thinks it does not necessarily follow that non-judicial tribunals should give reasons, but the ground for this distinction is not clear: perhaps because Sir Cecil Carr does not state his reasons for it. No one would expect a full dress statement of policy from a licensing body on each occasion when they grant or refuse a licence; but why should not a licensing authority enunciate from time to time the general principles which guide their decisions? Even assuming that administrative tribunals exercising certain minor functions be excused from the obligation to give reasons for their individual decisions to the same extent as the courts of summary jurisdiction,

<sup>8</sup> *Concerning English Administrative Law*, p. 123.

this would not apply to the more important decisions of administrative tribunals. A significant example of legislative support for the contention here put forward is contained in the Restriction of Ribbon Development Act, 1985, which confers certain appellate powers on the Minister of Transport. The Act provides that before determining any such appeal the Minister shall, 'if requested by either the highway authority or by the applicant, cause a local inquiry to be held in public; and in giving his decision the Minister shall publish a summary of facts as found by him and of his reasons for the decision'.<sup>9</sup> It is greatly to be hoped that Parliament will follow this excellent precedent.

What we advocate, therefore, is that all administrative tribunals, and other bodies performing judicial functions, should be required invariably to describe the reasons on which their decisions are founded. The reasons, like the decisions, may be good or they may be bad, the premises from which the argument starts may be true or false, the inferences unwarranted, and cause confused with effect; but the obligation to evolve a chain of reasoning which must stand the strain of criticism and discussion, is desirable from the point of view of promoting a sense of the judicial spirit in the adjudicator no less than in importing certainty into the body of the law.

The practice of giving reasoned decisions should, of course, be accompanied by the publication of those decisions in important cases. The two requirements should clearly go together, if parties appearing before the tribunal are to understand the principles by which their cases will be decided and, in consequence, the arguments by which they can be supported or opposed. Obvious though this may seem, it is not always recognised. Thus, the War Compensation Court appointed in 1921 to hear

<sup>9</sup> Section 7 (4).

claims arising out of the First World War, gave reasoned decisions but restricted their publication by merely sending typescript copies to the Inns of Court Libraries. They were thus not generally available either to lawyers or to laymen. The decisions of the General Claims Tribunal set up under the Compensation (Defence) Act, 1939, are similarly not published but are merely 'available for inspection by appointment' at a room in the Royal Courts of Justice in London.<sup>10</sup>

#### THE TECHNIQUE OF IMPARTIAL THOUGHT

We observed above that a judge in court must give reasons for his decision. The jury, on the other hand, are not permitted to state the reasons on which they base their verdict, and even if they wish to do so the judge will decline to listen.<sup>1</sup>

Paradoxical though it may seem, both these rules aim at a common purpose: namely, the development of a coherent and impersonal body of law. The judge puts the trained mind of a lawyer on to the case, and is able to reason to the conclusion in terms of legal technique. The jurymen, extracted for a brief moment from the quarry of laymen in which he normally has his being, is not equipped to express either his thoughts or his feelings in a manner consistent with the body of the law. So, like the young colonial judge, he is advised to give his conclusions only.

The habitual treatment of a series of phenomena with a view to the furtherance of a single purpose produces effects of the utmost importance to the human intellect. If a group of men work continuously at an art, or a craft, or a science, or a trade, a special method of thought and a special type of language is almost certain to arise

<sup>10</sup> R. E. Megarry, 'Administrative Quasi-Legislation', 60 *Law Quarterly Review*, p. 125.

<sup>1</sup> Halsbury, *Laws of England* (Hailsham Edition), Vol. 19, p. 317.

amongst them. 'The mental outlook of any group of persons similarly occupied', writes Mr. Delisle Burns, 'is naturally the same; this is reflected in their very language. Carpenters have a special language of their own, including words which are not used by ordinary men, for the parts of doors and windows. Seamen have their own language; railwaymen have theirs.'<sup>2</sup> I was myself closely interested in flying during the vital period of growth from the beginning of 1912 until the end of the war in 1918, and clearly recollect the way in which a special type of thought and a characteristic language came into use among those engaged in aviation in the course of a few years.<sup>3</sup>

No one consciously invented these various types of thought. They nevertheless play a part of great importance in the development of the subjects to which they relate. This is particularly the case in those fields of activity which, in the broadest sense of the word, comprise the sciences.<sup>4</sup>

There is an increasing tendency in modern times to lay more stress on the methods of thought which characterise a science than on the laws or principles or conclusions which at any given moment constitute the existing body of knowledge. 'Science is not wrapped up with any particular body of facts', writes Professor J. Arthur Thomson, 'it is characterised as an intellectual attitude.'<sup>5</sup> 'Statistics', declares Professor Bowley, 'I regard as a method rather than as a science.'<sup>6</sup> A similar view of economics is held by some of its leading exponents. Thus, Keynes remarks that economic science is 'a method rather than a doctrine, an apparatus of

<sup>2</sup> C. Delisle Burns, *Industry and Civilisation*, p. 258.

<sup>3</sup> During the Second World War the R.A.F. has been even more prolific in producing its own special terminology (by no means confined to technical matters) and its own outlook.

<sup>4</sup> Graham Wallas, *The Art of Thought*, p. 171.

<sup>5</sup> J. Arthur Thomson, *Introduction to Science*, p. 58.

<sup>6</sup> A. L. Bowley, *The Measurement of Social Phenomena*, p. 4.

the mind, a technique of thinking, which helps its possessor to draw correct conclusions'.<sup>7</sup> Stamp expresses a similar opinion when he says that 'economics strictly is not so much a body of knowledge as a mode of thought',<sup>8</sup> and he adds that it is one thing to be acquainted with the latest conclusions in any body of knowledge and quite another to possess its technique and be able to apply its teachings.<sup>9</sup>

Despite certain fundamental differences between civil law and natural science, law shares with the sciences the quality of possessing, in its developed stages, a special method of thought common to those who practise it and a special language for expressing that thought. This is notably the case with English law, which is, as Dean Roscoe Pound puts it, 'a mode of treating legal problems rather than a fixed body of definite rules'.<sup>1</sup>

On November 10, 1612, Lord Chief Justice Coke advised King James I that by the law of England the King could not in person adjudge a cause. 'But', said the King, 'I thought law was founded upon reason, and I and others have reason as well as the judges.' 'True it is', Coke replied, 'that God hath endowed His Majesty with excellent science and great endowments of nature; but His Majesty is not learned in the laws of his realm of England, and causes which govern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognisance of it.'<sup>2</sup> Science, like law, is founded upon reason, and others besides scientists are endowed with reason; but the problems of chemistry

<sup>7</sup> J. M. Keynes, *Introduction to Money* by D. H. Robertson, p. 5.

<sup>8</sup> Sir Josiah Stamp, *Current Problems in Finance and Government*, p. 6.

<sup>9</sup> *Ibid.* p. 10.

<sup>1</sup> Roscoe Pound, *The Spirit of the Common Law*, p. 1.

<sup>2</sup> 12 *Coke's Reports*, p. 63.

and mathematics and biology and medicine are, like the problems which arise in legal controversies, to be settled, not by 'natural reason', but by 'artificial reason and judgment'.

What we are concerned to suggest here is that the need for an 'artificial' method of thought arises in those departments of life where it is desirable that judgment should be formed without haste or emotion. The administration of justice was the first activity in which it became essential to obtain the kind of impartiality which is based on a suppression of personal emotion, and a willingness to suspend judgment until a systematic exploration of the ground has been made; but the psychological processes involved have spread with the rise of civilisation from one field to another. The 'artificial' methods of thought employed by all who have to make sound judgments, whether in courts of law or in laboratories or in wholesale produce markets, or elsewhere, are rooted in a desire to attain the impersonality which is a necessary accompaniment of the judicial spirit. The sense of fairness which we associate with the judicial mind implies an ability on the part of the judge to exclude from his estimation, in dealing with the case before him, every tendency to bias arising from emotional disturbances. In this respect law joins hands with science. We no more expect a judge to be influenced by the fact that one of the parties in a case has red hair, however much he may dislike that colour, than we expect an Australian professor of physics, in examining a new theory of matter, to be influenced by the fact that it is put forward by a Japanese scientist.

Continuous mental effort to suppress or to exclude rigidly all subjective considerations of an emotional kind tends then to create methods of reasoning which are 'artificial' in the sense that they demand an unnatural objectivity and the suppression of a large number of



important instincts. The reasoning on which the judgment is to be formed becomes, as we say, impersonal. It selects certain significant facts from an objective situation, and ignores the other aspects of the matter. The methodological procedure of modern science is 'exclusive and intolerant. . . . It fixes attention on a definite group of abstractions, neglects everything else, and elicits every scrap of information and theory which is relevant to what is retained'.<sup>3</sup> All parts of an experience are equally present, but they are not all of equal value to the adjudicator.<sup>4</sup> Thus, to the statistician a given individual is a unit in a group or in a defined series of mathematical terms; to the bacteriologist the same individual is a living anthropoid in whom certain conditions of bacterial immunity or infection are present or absent; to the engineer he is a creature for whose weight, height, physical movements and capacities regard must be paid in the shaping of hard materials. To the lawyer he is the subject of certain rights and duties which may be enforced in the courts. Legal technique, as M. Géný puts it, establishes a general scheme within which the actual facts of social life must find a place, and to which they must to some extent accommodate themselves.<sup>5</sup>

#### THE ARTIFICIAL REASON OF THE LAW

John Smith, living in a suburban villa on the outskirts of a city, is never, from the lawyer's point of view, a man of unique personality, who differs in the last resort from all other human beings. The colour of his eyes, his disposition to exaggerate, the peculiar way in which he brushes his teeth, his habit of whistling when asleep, his

<sup>3</sup> A. N. Whitehead, *Science and the Modern World*, p. 250.

<sup>4</sup> Cf. John Dewey, *How We Think*, p. 102.

<sup>5</sup> François Géný, 'Freedom of Decision', in *The Science of Legal Method*, p. 9, Modern Legal Philosophy Series, Macmillan, N.Y., 1921, trans. E. Biuncken. This volume contains several brilliant and suggestive essays.

liking for apricot jam, his interest in pigeon flying, the subtle blend of dislike and admiration with which he regards his domineering wife, his ambition to secure a seat on the local council, the mingled pride and apprehension which he feels towards his strong-minded son: in all this the lawyer takes for the most part no interest, save in so far as it may occasionally serve to establish facts in law. They are all important facts so far as John Smith is concerned as a human being, but in themselves they are of no legal consequence. What is legally significant about John Smith is the fact that he is a vendor, a purchaser, a ratepayer, a trustee, a master, a servant, a contractor, a tortfeasor. If he is the victim of a criminal injury, or himself commits a crime, he will, it is true, be just John Smith simpliciter, a participant in universal rights and duties, and no special category will be assigned to him; but he will still, as it were, be deprived of his uniqueness and robbed of his diversity.

This pulverisation of a sentient being into a mere series of categories is an illustration of the classifying process which is going on continually in judicial proceedings, not only in regard to persons, but also in regard to places, things and events. The examples are infinite in number. A telephone is a 'telegraph' within the meaning of the Telegraph Acts, and a conversation through the telephone is a 'telegram'<sup>6</sup>; winkles are 'fish' for the purposes of the Larceny Act<sup>7</sup>; a chauffeur is a 'member of the working classes' under the Housing Acts<sup>8</sup>; a room in a hotel from which a local pageant can be seen passing through the street is a 'place of entertainment' for the purpose of entertainment tax.<sup>9</sup> Lawyers look at the complex and moving realities of social life from a special angle, and submit those realities

<sup>6</sup> *Att.-Gen. v. Edison Telephone Co.* (1880), 6 Q.B.D. 244.

<sup>7</sup> *Leavett v. Clark*, [1915] 3 K.B. 9.

<sup>8</sup> *White v. St. Marylebone Borough Council*, [1915] 3 K.B. 249.

<sup>9</sup> *Gibson v. Reach*, [1924] 1 K.B. 204.

to artificial processes which transform, and sometimes deform, their effective nature. All manner of phenomena, which are variable and uncertain by nature, are cast into a firm and unchanging mould, and change their shape by passing through what M. Gény calls 'the crucible of the law'.<sup>1</sup>

The method adopted by the lawyer of selecting certain facts attaching to things or persons or events and classifying them in the categories which are alone significant to him, and then dealing with the case on the basis of that classification to the exclusion of other phenomena which he deems irrelevant, is precisely similar to the methods adopted by specialists in a large number of other fields of activity.

'Consider', says Dr. Whitehead, 'the lives of John Wesley and of Saint Francis of Assisi. For physical science you have in these lives merely ordinary examples of the operation of the principles of physiological chemistry, and of the dynamics of nervous reactions: for religion you have lives of the most profound significance in the history of the world.'<sup>2</sup> And similar abstractions are to be found throughout the whole realm of systematic thought. To an economic statistician the most obvious 'lines of division' for human beings appear to be 'civil condition', such as married, unmarried, divorced or widowed, or by economic classes, such as landowner, capitalist, entrepreneurs and employed; or, according to occupation, or rank or income.<sup>3</sup> To the traffic superintendent of a railway mankind is distinguishable according to its transportation needs, and the ability to convert those needs into effective demand. He cares no more for individual variations in the colour of

<sup>1</sup> François Gény, 'Freedom of Decision', in *The Science of Legal Method*, p. 9, Modern Legal Philosophy Series, Macmillan, N.Y., 1921, trans. E. Bruncken.

<sup>2</sup> A. N. Whitehead, *Science and the Modern World*, p. 229.

<sup>3</sup> A. L. Bowley, *The Measurement of Social Phenomena*, pp. 52-54.

passengers' eyes, or for their moral, social, æsthetic or political differences than does an insurance actuary for individual variations among the members of a particular age-group, the expectation of life of which he is calculating. The research chemist, the geologist, the civil engineer, and nearly all other specialists, are similarly engaged in observing and selecting facts significant to their work, abstracting them from their context and grouping them in ways likely to be useful. The sensational journalist on a London evening paper, who headed an account of an unseemly quarrel, 'Old Etonian thrashes Vicar',<sup>4</sup> had a mind which might have been trained to more scientific work; and the porter who is said to have told the old lady that 'cats is dogs, and rabbits is dogs, mum, but this 'ere tortoise is a hinsect' was unconsciously feeling his way towards methods of classification which underlie, not only law and science, but all systematic thought.

Scientific method, in the opinion of Professor Karl Pearson, actually consists in the careful and often laborious classification of facts, in the comparison of their relationship and sequences, and of the discovery of a brief statement which will resume in a few words a wide range of facts.<sup>5</sup>

'Classification', writes Professor Wolf, 'is a method of science, it is a way of knowing things. . . . The essence of classification consists in the fact that certain things are thought of as related in certain ways to one another.'<sup>6</sup> In this way it differs from collection, for it denotes the association of kindred facts, the collection, not of all, but of relevant and selected facts.

<sup>4</sup> This was an actual example. It is interesting to contrast the sensationalism of the journalist's method of classification with the legal method. 'The former is the exact opposite of the latter, the newspaper stressing exactly those social distinctions which are ignored in legal theory.'

<sup>5</sup> Karl Pearson, *Grammar of Science*, 3rd ed., p. 77. Cf. J. Arthur Thomson, *Introduction to Science*, p. 75.

<sup>6</sup> A. Wolf, *Essentials of Scientific Method*, pp. 30-31.

The process of classification, which is one of the principal elements in the 'artificial' reason of the law, has two or three great advantages. The attempt to see all things freshly and in detail rather than as types and generalities is exhausting, and among busy affairs practically out of the question.<sup>7</sup> But even apart from the necessities of action, we cannot think in terms of an indefinite multiplicity of detail; our evidence can acquire its proper importance only if it comes before us marshalled by general ideas.<sup>8</sup> Classification simplifies the circumstances relating to the controversy with which the judge has to deal, and reduces the issue to manageable proportions. It relieves the memory from what would otherwise be an intolerable burden by concentrating attention on certain vital aspects of the dispute. It objectifies the administration of justice by eliminating individual differences and insisting on class similarities. It makes for impartiality by securing that individuals and phenomena shall be differentiated according to recognisable objective criteria, and not according to the promptings of the subjective desires of the adjudicator. It avoids the possibility of justice being administered according to 'will' instead of 'judgment', as Alexander Hamilton put it,<sup>9</sup> by providing a series of known tests for the ascertainment of rights and duties.

#### THE EXCLUSION OF IMPONDERABLES

But there are certain disadvantages which must also be taken into account. The disadvantage of exclusive attention to any group of abstractions is that, by the nature of the case, you have abstracted from the remainder of things, and the whole is lost in one of its aspects.<sup>1</sup> The 'artificial reason' of the law tends to

<sup>7</sup> Walter Lippmann, *Public Opinion*, pp. 88-89.

<sup>8</sup> A. N. Whitehead, *Science and the Modern World*, p. 232.

<sup>9</sup> *The Federalist*, No. 78.

<sup>1</sup> A. N. Whitehead, *Science and the Modern World*, pp. 73, 246.

become rigid, and the system of classification may easily acquire an inflexibility which results in the neglect of factors which, though not susceptible to an orderly method of arrangement, are nevertheless of great importance.<sup>2</sup>

The disadvantage of the legal method of classification is, briefly, that it excludes imponderables: it suffers, like other methods, from the defects of its merits. The more subtle and intangible factors, which depend upon subjective taste and individual feelings, must necessarily be excluded from the administration of justice if the law is not to be brought into disrepute and ridicule. Yet these imponderables, although in the present state of knowledge they cannot be brought to the realm of consciousness and there be coherently explained and reduced to logical order, sometimes play an immensely valuable part in human affairs. A judge who is called upon to give or withhold consent to the marriage of a ward of court will inquire into the age, wealth and social position of the intended spouse<sup>3</sup>; but he cannot, in making his decision, pay regard to the delicate and subtle questions of character, environment, upbringing and mutual compatibility on which the success of a marriage depends, and which a parent would consider.

Mr. Walter Lippmann has indicated in a fine passage the ultimate necessity in intimate human relations for an 'individualised understanding'. Those whom we love and admire most, he says, are the men and women whose consciousness is peopled thickly with persons rather than with types, who know us rather than the classification

<sup>2</sup> A good example of the inflexibility of certain legal categories is given in the following passage from *Christina Alberta's Father*, by H. G. Wells: 'Legally, you're Preemby's daughter. Nothing can alter that. All the resemblances and coincidences in the world won't alter that.'

<sup>3</sup> A. H. Simpson, *The Law of Infants*, 4th ed., p. 178, and see the cases there cited.

into which we might fit. 'For even without phrasing it to ourselves, we feel intuitively that all classification is in relation to some purpose not necessarily our own; that between two human beings no association has final dignity in which each does not take the other as an end in himself.'<sup>4</sup> The law has very definite purposes which are greater than, and frequently incompatible with, the purposes of any individual member of society; and in so far as those purposes promote the general good this is the final justification for its classifying methods.

It is clear that imponderables must be excluded from legal reasoning if any known and predictable body of doctrine is to be built up. But it is also clear that only certain classes of questions can profitably be determined by that method of reasoning. Lord Alverstone, when Lord Chief Justice, was no doubt thinking of this when he refused to discuss the qualifications of a teacher from an educational point of view, because it was, he said, 'not a matter which can properly be discussed in a court of law'.<sup>5</sup> The educational fitness of a teacher could, no doubt, be investigated by legal methods so far as the more obvious qualifications are concerned, such as the holding of a degree, the length of teaching experience, and so forth, but an inquiry into the intangible qualities which go to make the born teacher would elude all attempt at capture by that method.

It is admittedly difficult to draw the line between the questions which can, and those which cannot, be adequately determined by means of the reasoning processes of the law; but it is easy to recognise instances which lie beyond the frontier. It is just possible, for example, to imagine the trustees of the Chantrey Bequest endeavouring to decide by legal methods of reasoning

<sup>4</sup> *Public Opinion*, pp. 88-89.

<sup>5</sup> *Crocker v. Plymouth Corporation*, [1906] 1 K.B. 494.

which pictures painted by contemporary artists during the year were most meritorious and deserving of purchase. What would happen would be that the man who had been a member of the Royal Academy for the longest period of time, or who had exhibited the largest number of pictures in public art galleries, or who had made the largest income during the previous ten years, or who could be differentiated by some other method of external measurement, would be accounted the most distinguished artist, and his works would be purchased. It is utterly impossible to believe that the best pictures would be selected by that method.

For centuries it has been the duty of the Home Secretary to decide in every case of murder whether the sentence of the court should be carried out, or a recommendation made to the Sovereign for the exercise of the royal prerogative of mercy. In the case of most other offences the judge has power to mitigate the penalty to meet extenuating circumstances, but in regard to the most serious of all crimes the judge is obliged to accept a verdict of guilty from the jury and is bound to pronounce a capital sentence.<sup>6</sup> His duty in this respect is, it has often been said, a purely ministerial one. After appeal to the Court of Criminal Appeal it is left to the Secretary of State for Home Affairs to take into consideration any recommendation for mercy put forward by the jury or any other circumstances which mitigate the gravity of the crime.

The Home Secretary takes into account not only the life-history, motives and mental condition of the prisoner, but also the state of popular feeling on the matter, and many other considerations. Lord Gladstone, when Home Secretary in 1907, endeavoured to describe the attitude adopted by himself and his predecessors in regard to the

<sup>6</sup> Halsbury, *Laws of England* (Hailsham Edition), Vol. 9, pp. 177-8.



evaluation of various imponderable elements in this connection in the following words<sup>7</sup> :—

‘It would be neither desirable nor possible to lay down hard and fast rules as to the exercise of the prerogative of mercy. Numerous considerations—the motive, the degree of meditation or deliberation, the amount of provocation, the state of mind of the prisoner, his physical condition, his character and antecedents, the recommendation or absence of recommendation from the jury, and many others—have to be taken into account in every case: and the decision depends on a full review of a complex combination of circumstances, and often on the careful balancing of conflicting considerations. As Sir William Harcourt said in the House of Commons, “The exercise of the prerogative of mercy does not depend on principles of strict law or justice, still less does it depend on sentiment in any way. It is a question of policy and judgment in each case, and, in my opinion, a capital execution which in the circumstances creates horror and compassion for the culprit rather than a sense of indignation at his crime is a great evil.” There are, it is true, important principles which I and my advisers have constantly to bear in mind; but an attempt to reduce these principles to formulæ, and to exclude all considerations which are incapable of being formulated in precise terms, would not, I believe, aid any Home Secretary in the difficult questions which he has to decide.’

Although the legal methods of classification eliminate to a large extent the imponderable elements from the case, and the ‘artificial reason’ which is based on those methods tends in the same direction, the mental processes of the judge are nevertheless at certain points often influenced to a considerable degree by the

<sup>7</sup> *Parliamentary Debates*, Vol. 172, April 11, 1907, p. 366. Quoted by Sir E. Troup, *The Home Office*, pp. 62–63.

imponderabilia. In order to appreciate the way in which this may occur, it is necessary to observe the psychological process by which a judicial decision is arrived at.

An analysis made by Graham Wallas of the whole process of constructive thought is very suggestive in this connection. He distinguishes four stages in the solution of a problem or in the life-history of a definite piece of intellectual achievement: preparation, incubation, illumination and verification.<sup>8</sup> It is during the third stage that the imponderable elements play the largest part.

It is possible to apply this analysis to the psychological processes involved in not a little of the more important kind of judicial work. A judge sits listening to the beginning of a case with an absolutely open mind; he reads the pleadings, hears counsel's main arguments, and settles down to follow the evidence. This we may regard as the stage of preparation, which, in the case of a scientist, would be replaced by a general investigation of the problem 'in all directions'. Quite often there is no stage which can be identified as that of incubation; but in a long or important case, or one in which the hearing is adjourned, the intervals between the hearings may be filled in, partly by subconscious mental events and partly by a voluntary abstention from all thought concerning the case, which may have an important and valuable effect in producing the best decision on the matter in issue. The habit of English judges of not infrequently allowing an interval to elapse between the close of a difficult case and the delivery of judgment may enable a like purpose to be served. A third stage, of illumination, may occur if the judge, as undoubtedly happens on occasion, suddenly has a definite 'feeling' about the case, an intuitive flash, an unformulated

<sup>8</sup> Graham Wallas, *The Art of Thought*, Chap. 4

suspicion of weakness regarding one of the parties which cannot at the moment be specified, an impression that something significant is being overlooked or passed over lightly, a feeling of mental discomfort at the persuasive and apparently flawless argument which counsel is putting forward in his address. This corresponds to the intimation which may come to a scientist who is on the verge of a hypothesis, or to the worker in any field of systematic thought. The fourth and last stage is the verification of the hypothesis which has been suggested in the preceding stage.<sup>9</sup> In the case of judicial work, the verification may consist of listening to further evidence, or recalling past witnesses, or a closer scrutiny of their recorded testimony, or of a careful examination of the legal arguments adduced by both sides and of the results which would follow from their adoption, and an investigation of the authorities cited.

The process of illumination is by far the most vital from the point of view of providing an opportunity for the imponderable elements in the case to play a part in applying the available categories, and employing the 'artificial reason' of the law, in the most advantageous manner possible. But it is precisely this intuitive process which is most incalculable and least subject to conscious control. It is, therefore, of the highest importance that its irrational nature should be appreciated, and the necessity recognised for the subsequent verification, in the most careful manner, of provisional 'solutions' which have been intuitively suggested. All we can say on this question, in the present state of knowledge, is that the best judges in all civilised countries appear to be those who possess (in addition to a mastery

<sup>9</sup> For an interesting example of the process at work, see *Ronne v. Ronne*, *The Times*, April 25, 1927.

of the law) an unusually wide range of natural intellectual power and emotional understanding; an extensive and normal experience of the world; and habits of thinking which modern psychology has shown to be successful, and of which they are themselves aware.

There are, however, certain departments of public affairs where it is desirable that those who have to perform judicial functions should be more free than any judge in a court of law can properly be, to give weight to the testimony of imponderable elements in human nature which are unrecognised by the 'artificial reason' of the law, and unknown to its categories.

It is here that administrative tribunals, with their greater flexibility and freedom from the ancient categories of the law, may be of the greatest service to the community. Mr. Justice Holmes, of the Supreme Federal Court of the United States, speaking of the rulings of an administrative tribunal, said: 'They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth'.<sup>1</sup>

It is in periods of rapid change, when the existing categories of the law seem no longer to be meeting social needs which have not yet crystallised into the definite form which they must assume before they can find expression in the general body of the law, that administrative tribunals have usually made their appearance: in Tudor England, in post-Revolution France, in twentieth-century America, in England during the past twenty or thirty years. And it is in such periods as these that the freedom to consider imponderables, which is

<sup>1</sup> *Chicago, B. and Q. Ry. v. Babcock* (1907), 204 U.S. p. 585.

possessed by administrative tribunals, may be most valuable.<sup>2</sup>

#### JUDICIAL DISCRETION

We have seen that the methods of thought peculiar to the law tend to impose upon the judge the necessity of dealing with a case within the confines of a series of well-defined categories. But it does not follow from this that the judge is not left with a large discretion as to the manner in which the case shall be decided within the boundaries thus marked out.

In some parts of the law, it is true, the judge is more closely bound to follow a particular course, once certain facts have been established, than in others. Where rigid rules of law prevail, a legal situation may admit of but a single solution—a mere application of the appropriate rule. This type of case, in which the judge is only called upon to apply an automatic rule, brings into play what is sometimes referred to as the subsuming function. We shall not here devote much attention to this type of activity, since there the judicial mind is seen at its lowest ebb.

What is of greater interest from the present point of view is the exercise of the judicial function in those far more important fields where a large discretion is left to the judge to use as he thinks fit.

‘Discretion’, it was said in an old case, ‘is a science or understanding to discern between falsity or truth, between right and wrong, between shadow and substance, between equity and colourable glosses and pretences, not to do according to the will and private affections’.<sup>3</sup> It must be exercised, said Lord Halsbury some centuries later, in accordance with ‘the rules of reason and justice,

<sup>2</sup> Ernst Freund, ‘The Substitution of Rule for Discretion in Public Law’, *American Political Science Review*, No. 4, p. 676.

<sup>3</sup> *Rooke’s Case* (40 Eliz.), 5 Co.Rep. 99 (b); *Keighley’s Case* (7 Jac. 1), 10 Co.Rep. 139 (a).

not according to private opinion; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular'.<sup>4</sup> The King's Bench has power to redress things that are done otherwise, notwithstanding that they are left to the discretion of those that do them.

The idea of a discretion which is to be exercised, not in a capricious and impetuous way, but in a disciplined and responsible manner, is a conception which has had a wide application in English law and politics. It really represents a compromise between the idea that people who possess power should be trusted with a free hand, and not tied down by narrow formulæ, and the competing notion that some contingent control must be retained over them in case they act in an unreasonable way. Discretion in public affairs is seldom absolute; it is usually qualified. It must be used 'judiciously', and hence we often hear the expression 'a judicial discretion'.

The judge, says Judge Cardozo, 'is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life"'.<sup>5</sup> In order to see what this means we cannot do better than to go outside the realm of formal proceedings in court and examine the administration of local government.

Ever since the time when the justices of the peace were in their heyday, the authorities concerned in the local government of the country have been regarded as possessing a discretion which had to be exercised in a strictly judicial way. Although the justices had important administrative duties and could appoint parish officers, allow their accounts, authorise rates, direct the mending of foundrous roads, order relief to a destitute person,

<sup>4</sup> *Jacob (Tomlin's) Law Dictionary*, London (1890) v. *Discretion*, 1 Lil.Abr. 477; *Sharp v. Wakefield*, [1891] A.C. 173; *Cassel v. Inglis*, [1916] 2 Ch. 211.

<sup>5</sup> B. J. Cardozo, *The Nature of the Judicial Process*, p. 141.

command a father to pay weekly sums for the maintenance of a bastard, apprentice a poor child, or remove a pauper to his place of settlement, they were, Mr. and Mrs. Webb point out, always justices controlled by a court of law rather than prefects controlled by a bureau, and even their executive duties had to be done 'with judicial forms and in a judicial spirit'.<sup>6</sup> A similarly qualified discretion has been applied to the modern local authorities which have superseded the justices in their administrative capacity.

The first condition imposed on the exercise of discretion is that the possessor of it must put his mind to the case and really use judgment in coming to a decision. He must not, that is to say, approach the matter with his mind already made up. He must not share the outlook of a certain income tax commissioner, who, when an appellant came before him seeking relief from liability to tax, asked him whether he had already seen the local surveyor of taxes, adding 'If you have, and cannot convince him, I am afraid there is little likelihood of your convincing us'.<sup>7</sup> It is a desire to avoid this sort of prejudice that underlies the principle that if the jury do not 'honestly and judicially' approach the question before them, a new trial may be ordered.<sup>8</sup> The case in hand must be looked at on its merits and not be determined without investigation by the light of some preconceived opinion on the subject. Thus, it is not a 'judicial exercise of their discretion' for licensing justices to pass a general resolution to refuse licensing certificates<sup>9</sup>; nor were the London County Council permitted to pass a resolution to the effect that no more permits to sell literature in the

<sup>6</sup> Sidney and Beatrice Webb, *English Local Government—The Parish and the County*, p. 309.

<sup>7</sup> W. B. Cowcher, 'Direct Taxation from an Administrative Point of View', *Journal of Public Administration*, July 1925, p. 262.

<sup>8</sup> Halsbury, *Laws of England* (Hailsham Edition), Vol. 19, p. 313.

<sup>9</sup> *R. v. Sylvester* (1862), 31 L.J.M.C. 93.

London parks should be granted, and then refuse an application made by a particular person for a permit to sell pamphlets.<sup>1</sup> The court held that it was an improper exercise of their discretion for the council to pass a general resolution not to grant permission and then to act automatically on that resolution. A judicial discretion requires that the question shall not be a *chose jugée*, but shall be approached with an open mind.

At the same time, an administrative authority may, in the exercise of its discretion, adopt a policy on the basis of which it will perform functions of a judicial nature. The essential question here is whether the policy is one which the administrative body is empowered to adopt by the legislation from which it derives its authority. A licensing authority, for example, in considering applications for the opening of cinemas on Sundays, are entitled to have regard to matters relating to the welfare, including the spiritual well-being, of the community and of any section of it.<sup>2</sup> 'There are', Lord Justice Bankes explained in the Court of Appeal, 'on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. . . . If the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.' In this particular instance, the Port

<sup>1</sup> *R. v. L.C.C.*, [1918] 1 K.B. 68. Cf. *R. v. Port of London Authority*, [1919] 1 K.B. at p. 184.

<sup>2</sup> *Harman v. Butt and Others*, [1944] 1 K.B. 491. See also *R. v. Prestwich Corporation, ex p. Gandy* (1945), 109 J.P. 157.



of London Authority had refused an application by a firm to construct a deep water wharf, a barge canal and quays, on the ground that the Parliament had charged the Port of London Authority with the duty of providing accommodation of that character in the port. The court held that the Port of London Authority had acted rightly and properly in considering these matters and that they were entitled to adopt a general policy in deciding applications for licences of this kind.<sup>3</sup>

In a later case the Minister of Transport was alleged to have improperly fettered his discretion as an appeal tribunal<sup>4</sup> by adopting the report of a committee which he had himself set up under statutory powers. It was also contended that the Minister had laid down for himself rules which prejudiced the issues he had to determine. The committee in question, presided over by Lord Amulree, had been asked to report on matters of principle and general policy regarding the London traffic problem so far as motor coach services were affected. Its first report contained an elaborate survey of the problem and formulated a series of principles for its solution. The Minister had adopted these principles.

The court held that the Minister had a full right in a matter of this kind to confer with, and to get advice from, anyone whom he thought likely to help him. He must keep the decision in any particular case in his own hands, but it was quite unreasonable to contend that he was not entitled to consult other persons in regard to general principles. Indeed, said Mr. Justice Charles, it would be utterly impossible to deal with a series of applications for road service licences in the London area without coming at an early stage to some conclusion as to the general principles to be followed. It was in the interest

<sup>3</sup> *R. v. Port of London Authority, ex p. Kynoch, Ltd.*, [1919] 1 K.B. at p. 184. The Court of Appeal remarked that an undue significance had been given to certain words in *R. v. Sylrester* (1862), 31 L.J.M.C. 93.

<sup>4</sup> Under s. 114 of the Road Traffic Act, 1930.

of all parties for this to be done as soon as possible; and it was also desirable that the policy should be embodied in a document accessible to those concerned. Natural justice must be observed. 'But when it was a question of policy to be determined by an executive Minister, it was a fallacy to apply to his consideration and decision of that question the principles applicable to disputes between parties as to their legal rights.'<sup>5</sup>

The second limitation which judicial discretion imposes is that the holder of it must honestly endeavour to further the purposes for which power has been given him, and must not seek to promote ends of his own, however benevolent or deserving of praise they may be.

There are many illustrations of this principle. Thus, overseers who were required by statute to certify whether applicants for liquor licences were residents and ratepayers of the parish were held not entitled to refuse certificates on the ground that in their opinion there were already too many public-houses in the neighbourhood.<sup>6</sup>

Licensing justices, it was said in the House of Lords, must use their discretion to carry out the purposes of the law, and must not by administrative evasion attempt to repeal the law which permits public-houses to exist. In another case, justices who were given power by statute to issue a distress warrant for non-payment of the Poor Rate were not permitted to refuse to issue it on the ground that 'the Act of Parliament was unjust'. The justices, said Cockburn, C.J., 'had no business to enter into that consideration at all'.<sup>7</sup>

Lord Moulton, again, in the *Arlidge Case*, observed that the Ministry of Health was bound to avail itself of its wide powers under the Housing Acts solely for the

<sup>5</sup> *R. v. Minister of Transport, ex p. Grey Coaches, Ltd.*, *The Times* newspaper, Feb. 23 and March 29, 1933. It is strange that this important case is not reported in the *Law Reports*.

<sup>6</sup> *Sharp v. Wakefield*, [1891] A.C. 173, Halsbury, L.C., at p. 181.

<sup>7</sup> *R. v. Boleter* (1864), 83 L.J.M.C. 101.

purpose of carrying into effect in the best way the provisions of the Acts.<sup>8</sup> Maitland had in mind this idea that the adjudicator may not seek to use his power to further purposes of his own, when he said, concerning the justice of the peace, that 'even if a discretionary power was allowed him, it was none the less to be exercised with "a judicial discretion"; it was not expected of him that he should have any "policy"; rather it was expected of him that he should not have any "policy"'.<sup>9</sup> Administrators, like judges, must have a policy whether they desire it or not, but the judicial process requires that the policy shall not be one for which no legal authority can be shown.

The third limitation imposed on the freedom of a person who is called upon to exercise discretion is that his motives must be straightforward and honest, and his conduct not influenced by extraneous matters. If it can be shown that a decision which is otherwise sound is based on motives which are not 'judicial', or on considerations which are not valid in law, it will be set aside as an improper exercise of discretion.

The recorded cases present many examples of this. The Judicial Committee of the Privy Council decided, in an Australian appeal, that the municipal council of a city which is authorised to take land compulsorily for specified purposes will not be permitted to acquire it for different purposes, and its activities in this direction will be curtailed where it is shown that the council though professing to exercise its powers for the statutory purpose, was in reality employing them to further some ulterior object.<sup>1</sup> In another case it was decided that a city corporation could not refuse to sanction building plans which complied with the regulations, on the ground that the houses

<sup>8</sup> *Local Government Board v. Arlidge*, [1915] A.C., at p. 147.

<sup>9</sup> F. W. Maitland, 'The Shallows and Silences of Real Life', *Collected Papers*, Vol. 1, p. 478.

<sup>1</sup> *Municipal Council of Sydney v. Campbell*, [1925] A.C. 338, Duff, J.

planned were unsuitable to the locality and would depreciate the character of the neighbourhood.<sup>2</sup> In another case the Corporation of Brighton were shown to have been influenced, in refusing charabanc licences to a road transport company, by the fact that the company was defying the wishes of the corporation by running motor omnibuses into the city, and setting down passengers there in the narrow streets. *Held*, that the corporation had considered an extraneous matter which had probably influenced their decision, and it must therefore be quashed.<sup>3</sup>

In these limitations which are imposed on the exercise of discretion, in this gradual evolution of the idea of a discretionary power which is qualified rather than absolute we can see an attempt to eliminate, from the action of the determining authority, caprice on the one hand and prejudice on the other. The mind of the authority is not to enjoy an unlimited freedom to decide howsoever it thinks fit, nor is it to be bound in advance to decide in a particular fashion. There is to be an element of balance in the decision which in some way we associate inevitably with the judicial spirit. The early stages of law, though not the earliest,<sup>4</sup> witness the substitution of a rule for the caprice of an autocrat. Later, it is seen that it is better to give a wide discretion to the judge in substitution for a rigid formula. A further development occurs when this judicial discretion, with its freedom and its limitations, is extended to public authorities other than judges in courts of law. Within certain limits, the individual who exercises discretion is quite free: but if he venture outside those frontiers his power ends; if he takes into consideration matters 'fantastic and foreign to

<sup>2</sup> *R. v. Newcastle-on-Tyne Corporation* (1889), 60 L.T.(S.S.) 963.

<sup>3</sup> *R. v. Brighton Corporation* (1916), 14 L.G.R. 776; see also *R. v. Farnborough Urban District Council*, [1920] 1 K.B. 234; *R. v. Bowman*, [1898] 1 Q.B. 668.

<sup>4</sup> Cf. T. T. Hobhouse, *Morals in Evolution*, Chapter on 'Law and Justice'.

the subject-matter', if he decide the matter according to 'the will and private affections', then he is regarded as having failed to exercise any discretion at all.<sup>5</sup>

The idea of a qualified, or judicial, discretion is not applied to public affairs only. There is a 'judicial' element present in the obligation to transact certain private matters in a reasonable manner. Consents which must not be withheld unreasonably, contracts which must be carried out reasonably, restrictive covenants which must not go beyond what is reasonably necessary, all imply a discretionary limit which must not be overstepped.<sup>6</sup>

We think that the obligation to exhibit a judicial discretion could with advantage be imposed on administrative and domestic tribunals. Administrative tribunals came to be set up mainly because the ordinary processes of the law were too circumscribed to achieve certain ends, and because the methods of the courts of law were found to be too slow and expensive. But although it may be desirable for certain purposes to have tribunals which are not bound by an inexorable body of law, and which can consider new social needs, it does not follow necessarily that such bodies should be entirely uncontrolled. In our desire to promote social ends which at present obtain little support in the courts of law, we must be careful not to go to the other extreme and abolish all the formal checks on capricious impulse and emotional disturbance, on the exercise of power according to 'will' instead of 'judgment' which in the last resort it is the function of the law to safeguard. We must not rely too exclusively on the inherent benevolence and incorruptibility of mankind, nor put too great a strain on human nature by according absolute freedoms lightly, else we may find the tyrant in our midst once more.

What is needed at the present time is that the

<sup>5</sup> *R. v. Local Government Board*, [1918] 2 Ir.R. 131.

<sup>6</sup> *Houlder Brothers v. Gibbs*, [1925] Ch. 675.

administrative and other tribunals whose decisions at present enjoy an absolute immunity from review by the courts (assuming that certain superficial and elementary procedural requirements are complied with) should be required to display a judicial discretion in making those decisions. Where it can be shown that they have not come to the question in dispute with an open mind, ready to investigate it on its merits; where they do not use their power with the intention of honestly endeavouring to further the purposes for which it has been given to them; where the motives which prompt the decision can be proved to be neither honest nor straightforward; where the tribunal has been influenced by extraneous considerations; then in any of these circumstances the conclusions of the tribunal should be open to review, and, if necessary, set aside. We cannot endow all men with the judicial mind; but we can at least prevent them from behaving in a manner which makes sound judgment impossible. We cannot define the path along which every tribunal which has to determine complex social questions must walk, but we can keep them from turning in certain directions which are known to lead away from the promised land of justice.

#### THE GOOD JUDGE

The judge, as we have seen, must exercise his functions in a way which fulfils the need for consistency, for equality and for certainty. His administration must be objective and impartial, and he must state explicitly the reasons for his decisions. He must suppress his personal emotions and instinctive prejudices and encourage his sense of fairness. He must do right to all manner of men 'without fear or favour, affection or ill-will'. He must not be of that company of whom Valentine cries, in *The Two Gentlemen of Verona*: 'These are my mates, that make their wills the law'. He must come to the case

with an open mind. Alertness, flexibility, curiosity must be the friends of his mind; caprice, rigidity and prejudice its enemies.<sup>7</sup> He must be able to suspend judgment until he has systematically surveyed the circumstances of the case.

But the possession of those qualities does not mean that the judge is to be a mere logical machine, an intellectual abstraction. 'Deep below consciousness', writes Judge Cardozo, 'are other forces, the likes and dislikes, the predilections and the prejudices. The complex of instincts and emotions and habits and convictions, which make a man, whether he be litigant or judge.' There has been, he adds, a certain lack of candour in the discussion of this theme, or rather in the refusal to discuss it, as though judges must lose respect and confidence by the reminder that they are subject to human limitations. 'None the less . . . they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do.'<sup>8</sup>

It is necessary to touch on this subject in order to disperse a legendary conception of judicial impartiality which commonly prevails. The administration of justice requires just as much prejudice on the part of the judge in one sense as in another sense it requires an absence of prejudice. Society demands that its judges shall be biased in certain directions no less insistently than it demands that they shall be unbiased in others. Ethical considerations cannot be excluded from the administration of justice any more than from any other department of government.<sup>9</sup>

The very fabric of English law bears witness to the truth of this assertion. Take as a single instance the

<sup>7</sup> See *ante*, pp. 286-294

<sup>8</sup> B. J. Cardozo, *The Nature of the Judicial Process*, p. 167.

<sup>9</sup> Dillon, *Laws and Jurisprudence of England and America*, p. 18.

formative influence of public policy, or the policy of the law, as it is sometimes called, on the body of legal doctrine existing at any given time. Public policy can be found entering into every department of English law; and in many branches it has had a decisive influence. We see it as a prevailing element in judgments relating to agreements in restraint of trade,<sup>1</sup> validity of contracts,<sup>2</sup> misrepresentation and fraud,<sup>3</sup> the foundation of charities,<sup>4</sup> partnerships,<sup>5</sup> wills,<sup>6</sup> marital relations,<sup>7</sup> criminal offences,<sup>8</sup> trusts,<sup>9</sup> policies of assurance, wagering, and a vast number of other matters. Wherever we look we see it running like a red thread through the carpet of the law. It is public policy which makes void a deed providing for future illegitimate children<sup>1</sup>; it is public policy which prohibits public officers from assigning their salaries<sup>2</sup>; it is public policy which prevents the enforcement of promises made in consideration of sexual immorality<sup>3</sup>; it is public policy which sets aside charitable gifts intended for the use of a Franciscan convent, for the

<sup>1</sup> J. B. Matthews and H. M. Adler, *Restraint of Trade*; W. H. Moller, *Voluntary Covenants in Restraint of Trade*. Cf. *Nordenfeldt v. Maxim-Nordenfeldt Gun Co.*, [1894] A.C. 535; *Attwood v. Lamont*, [1920] 3 K.B. 571; *Moris v. Sawelby*, [1916] 1 A.C. 688; *Hepworth v. Ryott*, [1920] 1 Ch. 1; *N.W. Salt Co. v. Electrolytic Alkali Co.*, [1914] A.C. 461.

<sup>2</sup> Sir W. Anson, *Law of Contract*, 14th ed., p. 239 ff.

<sup>3</sup> *Begbie v. Phosphate Sewage Co* (1875), L.R. 10 Q.B. 199; *Post v. Marsh*, (1880), 16 Ch.D. 395; *Bile Bean Manufacturing Co. v. Davidson* (1906), 8 F. (Court of Sess.) 1181; *Slingsby v. Bradford*, [1906] W.N. 51, C.A.

<sup>4</sup> *Walsh v. Gladstone* (1842), 13 Sim. 261; *De Windt v. De Windt* (1854), 2 Eq.Rep. 1107; *Bourne v. Keane*, [1919] A.C. 815.

<sup>5</sup> *Sterry v. Clifton* (1850), 9 C.B. 110; *Jeffrey v. Bamford*, [1921] 2 K.B. 351; *O'Connor v. Rolson*, [1920] 3 K.B. 451.

<sup>6</sup> *Re Beard, etc.*, [1908] 1 Ch. 383; *Re Morgan* (1910), 26 T.L.R. 358; *Re Sandbrook*, [1912] 2 Ch. 471.

<sup>7</sup> Halsbury, *Laws of England* (Hailsham Edition), Vol. 16, pp. 715-6; Anson, *op. cit.* p. 247; *Hermann v. Charlesworth*, [1905] 2 K.B. 123; *Low v. Peers* (1768), 4 Burr. 2225; *Hartley v. Rice* (1806), 10 East 22.

<sup>8</sup> *Consolidated Exploration Co. v. Musgrave*, [1900] 1 Ch. 37; *R. v. Porter*, [1910] 1 K.B. 369; *Dann v. Curzon* (1910), 27 T.L.R. 163.

<sup>9</sup> *Thompson v. Thomas* (1891), 27 L.R. Ir. 457; *Morley v. Rennoldson*, [1895] 1 Ch. 449; *Phillips v. Probyn*, [1899] 1 Ch. 811.

<sup>1</sup> *Thompson v. Thomas* (1891), 27 L.R. Ir. 457.

<sup>2</sup> *Wells v. Foster* (1841), 8 M. & W. 151.

<sup>3</sup> Anson on *Contracts*, 14th ed., p. 248; *Gray v. Matthias* (1800), 5 Ves. 285 (a); *Beaumont v. Reeve* (1846), 8 Q.B. 483.



education and maintenance of Dominican priests, for the payment of fines by imprisoned criminals, for the promotion of atheism, for the ecclesiastical supremacy of the Pope,<sup>4</sup> and for a host of other objects. It is impossible here even to outline the full scope of public policy as a law-moulding agency, initiated and developed entirely by judges of the superior courts; but enough has been said to indicate its importance. Yet public policy is nothing more or less than the expression of certain social sympathies and antagonisms of the judges, certain ethical ideals, which have taken definite form in particular decisions, and in that way become crystallised into stable doctrines.

Nor is the influence of ethical considerations formulated by the judge a thing of the past. In England the courts cannot stereotype national policy, or the policy of the law, it was said by a law lord in one leading case. Their function is not merely to accept the rule of policy laid down a century ago, but also to ascertain what is the rule of policy for the present time; and it then becomes their duty to refuse to give effect to transactions which violate that policy, since to do so would prove injurious to the community.<sup>5</sup>

What is to be regarded as injurious to the community is, however, a matter which depends on the ethical and social outlook of the judges who happen to be on the bench at a particular moment. There is no copyright in a book which, in the view of the court, is unfit for sale on the ground of immorality, blasphemy or sedition.<sup>6</sup> A century ago the Court of Chancery refused to grant protection against piracy to Byron's *Don Juan*, because

<sup>4</sup> *Walsh v. Walsh* (1869), I.R. 4 Eq. 396; *Bowman v. Secular Society*, [1917] A.C. 406; *Re Macduff*, [1896] 2 Ch. 461, at 471. And see Halsbury, *Laws of England* (Hailsham Edition), Vol. 4, pp. 135-6, and the cases cited therein.

<sup>5</sup> *Nordenfeldt v. Maxim-Nordenfeldt Gun Co.*, [1894] A.C. 535, Lord Watson at p. 553.

<sup>6</sup> Halsbury, *Laws of England* (Hailsham Edition), Vol. 7, pp. 523, 545.

of its 'marked disrespect towards the morals, the religion and the political institutions of England'.<sup>7</sup> Today, *Don Juan* is an accepted classic, disrespect and all; but copyright is denied on similar grounds to a book by Mrs. Elinor Glyn, called *Three Weeks*, a novel which, a learned judge remarked, 'apart from its other objectionable features, advocates free love and justifies adultery where the marriage tie has become merely irksome',<sup>8</sup> and which, stripped of its trappings, appeared to him as 'nothing more or less than a sensuous adulterous intrigue'.<sup>9</sup> *Three Weeks*, unlike *Don Juan*, is never likely to become a classic, or even a remembered literary work; but that is beside the point, since all that we are endeavouring to demonstrate is that the judicial process is a function in which the ethical and social prejudices of the judge play a large part.

In all civilised countries the judge must, in fact, possess certain conceptions of what is socially desirable, or at least acceptable, and his decisions, when occasion arises, must be guided by those conceptions. In this sense judges are and must be biased.

There is nothing startling, or even disrespectful, in this assertion. It is a simple fact that a man who had not a standard of moral values which approximated broadly to the accepted opinions of the day, who had no beliefs as to what is harmful to society and what beneficial, who had no bias in favour of marriage as against promiscuous sexual relations, honesty as against deceit, truthfulness as against lying; who did not think wealth better than poverty, orthodox religion preferable to atheism, courage better than cowardice, constitutional government more desirable than anarchy, would not be tolerated as a judge on the bench of any Western country.

<sup>7</sup> *Lord Byron v. Dugdale* (1823), 25 Revised Reports 282; 1 L.J.Ch. 239-240.

<sup>8</sup> *Glyn v. Weston Feature Film Co.*, [1916] 1 Ch. 261.

<sup>9</sup> *Ib.*

Yet fornication, atheism, cowardice, lying and many forms of deceit are permitted under the law of England.

Everyone who has to use his discretion in connection with social affairs must in the last resort exercise it in accordance with preconceived ideas of what is desirable, be he administrator or judge or legislator. In this sense judges are, and must be, biased. A background of social prejudice is as necessary for judges as it is for the rest of us, and cannot be dispensed with in the discharge of their daily work. It would be almost impossible to run the judicial system if judges had an absolutely open mind on every question under the sun, and had no bias in favour of goods recognised as such by the majority of their fellow-countrymen.

The holders of judicial office are, in fact, in the end, like all public functionaries, charged with the responsibility of choosing, and of choosing well.<sup>1</sup> The cold neutrality of an impartial judge', of which Burke<sup>2</sup> speaks, is neither an accomplished fact nor a desirable ideal, and no useful purpose is served by discussion which implies that at a certain point in a man's career he suddenly loses all the normal attributes of human nature. A more enlightened appreciation of the service to the public which is rendered by a judge who adorns his office, and of the difficulties with which he is confronted, would start by contrasting the effort of mind which is demanded of him in order to overcome his natural prejudices, with the lazy refusal to make a similar effort which is manifested by the greater part of mankind in the ordinary affairs of the market-place and the forum and the domestic hearth and the political meeting. Except when we deliberately keep prejudice in suspense, Mr. Walter Lippmann reminds us, we do not study a man and judge him to be bad. We

<sup>1</sup> Learned Hand, 'The Speech of Justice', *Harvard Law Review*, 29, p. 621.

<sup>2</sup> Burke, 'Preface to Brissot's Address', *Works*, Vol. 5, n. 67.

see a bad man. We see a dewy morn, a blushing maiden, a sainted priest, a humourless Englishman, a dangerous Red, a carefree Bohemian, a lazy Hindu, a wily Oriental, a dreaming Slav, a volatile Irishman, a greedy Jew, a 100 per cent. American. In the workaday world that is often the real judgment, long in advance of the evidence, and it contains within itself the conclusion which the evidence is pretty certain to confirm. Neither justice, nor mercy, nor truth enter into such a judgment, for the judgment has preceded the evidence.<sup>3</sup>

Even from the point of view of the judge himself, the 'cold neutrality' legend is definitely unhelpful. It has been widely observed that the judge who realises before listening to a case that all men are biased is more likely to make a conscientious effort at impartiality than one who believes that elevation to the bench makes him at once an organ of infallible logical truth.<sup>4</sup>

What is meant by the impartiality of judges, so far as social matters are concerned, is that they shall not permit their opinions on certain controversial subjects of the day to influence their judgment. The judicial mind is not to be deflected by the passions of the moment on social, economic, political or religious questions.<sup>5</sup> Nor is it enough for the judge merely to endeavour to discover and follow the deeper and more permanent loyalties of the community. He must also seek to promote the progressive evolution of society, to manifest what Judge Learned Hand calls 'the half-framed purposes of his

<sup>3</sup> Walter Lippmann, *Public Opinion*, pp. 119-120.

<sup>4</sup> Lord Justice Scrutton, 'The Work of the Commercial Courts' (1923), 1 *Cambridge Law Journal*, p. 8.

<sup>5</sup> A good example of the non-judicial attitude is given by Dr. R. M. Jackson. 'A method of measuring the permeability of certain structures to gas was accepted when put forward by the gas expert to the Home Office, and then repudiated when the method was used by the scientists on the grounds that those scientists were thought to be communists. Yet the lawyer in his courts and the scientist in his scientific publications would incur the contempt of his fellows if he used such arguments', *The Machinery of Justice in England*, p. 301.

time'.<sup>6</sup> The 'good' decision is not the one which necessarily satisfies public opinion today, but that which will also be felt to be right five or fifteen years hence. Just as the good judge of art or literature is the man who can discern those qualities in a picture or a book which will stand the test of time, so the good judge in a court of law or other tribunal is the one who can use his discretion in a way which will assist the evolving tendencies of the community. Stress is always laid on the duty of a judge to be a trustee of the past; but in reality it is far more important that he should be a prophet of the future, in so far as that is compatible with the faithful administration of the existing body of law.

The administration of justice in a modern community requires, we suggest, not only a real desire on the part of the judge to promote the general welfare of the community, but also a judicial outlook in regard to social matters which is neither static nor rooted in the past. 'My duty as a judge', says Judge Cardozo, 'may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of men and women of my time. Hardly shall I do this well if my own sympathies and beliefs and passionate devotions are with a time that is past.'<sup>7</sup> It is when judicial functions are exercised with scant regard for the evolution of society that judicial institutions are called into question. It is when the attainment of the 'good to be' is obstructed by the preservation of the 'good that is', that the plain man becomes distrustful of the judicial process; it is when the courts of law fail to reflect the progressive tendencies of the time, and to promote the social aspirations of today as well as those of yesterday, that administrative tribunals are called into

<sup>6</sup> Learned Hand, 'The Speech of Justice', *Harvard Law Review*, 29, pp. 617-618.

<sup>7</sup> B. J. Cardozo, *The Nature of the Judicial Process*, p. 173.

existence in the belief that they, at least, will respond more exactly to present needs.

But administrative and domestic tribunals often themselves display an incapacity for promoting the social development of the community no less marked than that shown by such formal courts as that presided over by Judge Raulston at the trial of Mr. Scopes, in Dayton, Tennessee, on the charge of teaching the Darwinian theory of Evolution in a State school. The General Medical Council, which, as we noted in Chapter 4,<sup>8</sup> performs important judicial functions in hearing cases where 'infamous conduct in any professional respect' is alleged against a medical practitioner, has of late years been severely criticised as a judicial body on grounds which, at bottom, amount to the allegation that the professional instincts of the members of the council prevent them from exercising their powers in a manner which is consonant with the newer ideals and discoveries of the medical world, and the changing needs of the general public. The president of the council, Sir Donald MacAlister, in his opening address at the 123rd session of the council,<sup>9</sup> appeared totally unable to comprehend the nature of this criticism. The council, he said, is always ready to entertain requests for restoration to the Medical Register by practitioners whose names have been removed. It has provided a regular procedure which is 'uniform for all that it may be just for all'; and this procedure, he added later, has often been 'vindicated' by the High Court of Justice. The council would, he continued, always exercise its judicial functions 'without fear or favour, affection or ill-will'. Its stability as a judicial body was not to be swayed from an even course by partisan abuse or threat. Criticism of the composition of the tribunal, which the president described as an

<sup>8</sup> See pp. 230, 231.

<sup>9</sup> *Times*, June 2, 1926.

'attempt to influence the Council's judgment by threatenings against its constitution if it did not yield to interested or ignorant demands', he likened to 'the lawless attempt on a larger scale against the national constitution itself', which he asserted to be the object of the General Strike of 1926.

The president of the General Medical Council seemed totally unable to grasp the fact that the procedure of a judicial tribunal may be unimpeachable, its stability unquestioned, and its business conducted without personal favouritism, and yet that the authority of the tribunal may nevertheless be challenged, and the sense of what justice requires be left unsatisfied, if the outlook of the judges is rooted in the past; if, from professional instinct, or any other reason, they are unable to display an allegiance to the future, and unwilling to make allowance for the aspirations which others may have conceived. An ability to hold the scales evenly, not only between man and man, but between the claims of the past and the claims of the future, is one of the qualities which goes to the making of the true judicial mind.

#### CONCLUSION

We have attempted in this chapter to analyse the more important psychological elements which are involved in the judicial process, and which are often summed up in such phrases as 'the judicial temper' or 'the spirit of justice'. Our analysis has been brief and inadequate, but in a work, the primary object of which is to survey administrative tribunals and other judicial institutions outside the formal courts of law, it was essential that some mention, however insufficient, should be made of the logical and psychological factors which are involved in the judicial process. To have concentrated exclusively

on the formal or external attributes of judicial administration would resemble a performance of *Hamlet* without the Prince of Denmark.

We can now pass on to a discussion of the inquiry into administrative tribunals conducted by the Committee on Ministers' Powers and the report of that body.



## CHAPTER 6

### THE COMMITTEE ON MINISTERS' POWERS

The Genesis of the Inquiry—The Treasury Solicitor's Evidence—The Ministry of Health's Evidence—The Author's Evidence—The Evidence of the National Federation of Property Owners—Dicey and the Rule of Law—Judicial and Quasi-Judicial Decisions—The Safeguards of Justice—Administrative Law Disavowed—The Issues Defined—Dr. Jennings' Views—Dr. Allen's Views—Conclusion.

#### THE GENESIS OF THE INQUIRY

THE first edition of this book appeared in 1928. The following year the late Lord Hewart, L.C.J., published *The New Despotism*. The late Dr. F. J. Port also published his book on *Administrative Law* in 1929. There was considerable comment, both in the legal profession and elsewhere, that the Lord Chief Justice should have made so violent and undisguised an attack on the Civil Service while still holding high judicial office in which he would frequently have to decide cases involving the exercise by government departments of the very powers against which he inveighed. The effect of his book was to give immediate political importance to the question whether the traditional liberties of the British people were endangered by the acquisition of legislative and judicial functions by the Executive.

There is, Lord Hewart declared, a persistent influence at work which, whatever the motives or intentions that support it, undoubtedly has the effect of placing a large and increasing field of departmental authority and activity beyond the reach of the ordinary law. Thus, what he called a despotic power was being produced which places government departments above the sovereignty of Parliament and beyond the jurisdiction of the courts. He

then remarked that the growth of the system of delegating legislative power to government departments had proceeded side by side with a great increase in the number of public officials,<sup>1</sup> and suggested that it was 'the officials in the departments concerned who initiate the legislation by which the arbitrary powers are conferred upon them'.<sup>2</sup> Thus, in short, Parliament is hoodwinked by the Cabinet, the Cabinet is directed by the officials, and the officials are guilty of a vast conspiracy to deprive the commonwealth of the hard-earned constitutional liberties which have been won through centuries of strife and sacrifice.

When legislation provides that a question is to be decided by a Minister, continued Lord Hewart, the provision really means that it is to be decided by some official who has no responsibility except to his official superiors.<sup>3</sup> The official is anonymous, he is not bound by any course of procedure, nor by any rules of evidence, nor is he obliged to give any reasons for his decision.<sup>4</sup> 'To employ the terms administrative "law" and administrative "justice" to such a system', he declared, 'is really grotesque. The exercise of arbitrary power is neither law nor justice, administrative or at all.' There are no rules or principles of this astonishing variety of administrative 'law'.<sup>5</sup>

The Lord Chief Justice then went on to state that administrative law in this country is not really a system at all, but is merely an exercise of arbitrary power in relation to certain matters specified by legislation in an entirely haphazard manner.<sup>6</sup> Arbitrary power of this kind 'is certain in the long run to become despotism'.<sup>7</sup> This arbitrary power is not something which is thrust from

<sup>1</sup> *The New Despotism*, p. 59.

<sup>2</sup> *Ibid.* p. 52.

<sup>3</sup> *Ibid.* p. 43.

<sup>4</sup> *Ibid.* p. 44.

<sup>5</sup> *Loc. cit.*

<sup>6</sup> *Ibid.* p. 46.

<sup>7</sup> *Ibid.* p. 52.

outside upon a body of reluctant officials. It is, on the contrary, 'they who seek it, it is they who ask for it, and it is they who contrive it'.<sup>8</sup>

This simple denunciation received immediate acclamation in the press, on the platform and in Parliament. It is not too much to say that Lord Hewart's attitude represented 99 per cent. of the opinion then held by the bench, the bar and the solicitors' branch of the profession. The reason, of which they were doubtless unconscious, is interesting. An opposition has for long existed in Britain between the idea of 'law' and the idea of 'government'. This is a heritage from the conflict in the seventeenth century between, on the one side, a sovereign claiming to rule by divine right and to exercise an undisputed prerogative in all matters of government, and, on the other side, a nation claiming a supreme law to which even the sovereign should be subject. That struggle between King and Commons has become transformed in our own day into a conflict between the Executive, on the one hand, and the Judiciary and the legal profession on the other. The lawyers still regard themselves as champions of the popular cause; but there can be little doubt that the great departments of State administering or supervising public health, public education, pension schemes, unemployment and health insurance, housing and all the other modern social services, are not only essential to the well-being of the great mass of the people, but also the most significant expressions of democracy in our time. Considerations of this kind, however, could scarcely be expected to weigh with the predominantly upper middle-class conservative legal mind.

What may be accounted an influence of some importance was the injury to the livelihood and prestige of the legal practitioner engaged in private practice and

<sup>8</sup> *Ibid.* pp. 157-158.

threatened by the new development. Just as the rank and file of the medical profession have displayed for decades an uncompromising hostility towards the public health movement and the modern science of preventive medicine; just as in the sixteenth century the practitioners of the common law courts fought desperately to avert the shifting of the living law to the King's Council, to the Court of Requests, the Court of Chancery and the Star Chamber<sup>9</sup>—all of them what we should now call administrative tribunals—so today it requires no great effort of the mind or will to enable a lawyer or a judge to persuade himself that a development which removes disputes from the courts, which will provide a mode of adjudication wherein the practising lawyer has so far had but little part, in which a rival technique and a new jurisdiction will outstrip the waning popularity of the established courts, is a Machiavellian tendency which the public good requires to be stamped out like an evil pest.

This was the setting in which the Committee on Ministers' Powers was appointed in October, 1929. It is worthy of note that although the committee was appointed by the Lord Chancellor of a Labour Government, every effort was made to balance equally the political and professional elements among its members. Thus, there were three Conservative ex-Ministers and three Labour Members of Parliament; Professor Laski and the late Sir William Holdsworth presenting the extremes of academic opinion. The legal profession was represented by three eminent King's Counsel and three leading solicitors; while the Civil Service was represented by Sir Warren Fisher, its official head, Sir John Anderson, then Permanent Under Secretary at the Home Office, and Sir Claud Schuster, permanent secretary to the Lord Chancellor.

The terms of reference are of great significance. In them the committee was directed 'to consider the powers

<sup>9</sup> Cf. Roscoe Pound, *The Spirit of the Common Law*, p. 73.

exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law'. Here we have the curious spectacle of the conclusions at which the committee is expected to arrive being embodied in its terms of reference. The committee started life with the dead hand of Dicey lying frozen on its neck.

This book is not concerned with delegated legislation, and I shall therefore not give any attention to the committee's examination of that subject. I shall confine myself exclusively to the committee's consideration of judicial powers exercised by Ministers and organs appointed by the executive. The volumes of evidence are of great interest, and I propose to refer to some of the more important testimony before discussing the report.

#### THE TREASURY SOLICITOR'S EVIDENCE

Sir Maurice Gwyer, the Treasury Solicitor, opened his evidence by ridiculing the 'popular portrait' of the civil servant (by which he no doubt meant the portrait drawn by Lord Hewart) as avid of power and unscrupulous in his method of acquiring it. He had himself never encountered men of this type in the course of his long official experience. Civil servants, he said, are hard-pressed men who have not the time, even if they had the desire, to devote their energies to the acquisition of power for the purpose of harassing the King's subjects. Moreover, the alleged 'lawlessness' of the executive is a figment of the imagination. 'The administrator has the same respect for law as the average Englishman, and

neither consciously nor unconsciously seeks to set himself outside it or above it.'<sup>1</sup>

Sir Maurice Gwyer was responsible for informing the committee that 'a clear distinction is to be drawn between judicial and quasi-judicial powers'. The judicial power in the strict sense he defined as a power to decide a question of legal right in a dispute between parties involving either a finding of fact or the application of a fixed rule or principle of law, or involving both.<sup>2</sup> The quasi-judicial power he defined as meaning 'the power of giving decisions on questions or differences of an administrative and non-justiciable character [which] cannot be determined by reference to any fixed rule or principle of law, but are a matter of administrative discretion and judgment'.<sup>3</sup> In deciding such matters as whether a new school is not required, or that a local education authority have properly refused a licence for a child to take part in a public entertainment, or in settling a dispute between an inspector of weights and measures and any other person regarding the method of testing or verifying a weight or measure, a department is in effect only performing a special kind of administrative function. 'It may be called a quasi-judicial function', observed the witness, 'because the Department must approach the question to be settled with an impartial mind, must ascertain the point of view of each party, and must, broadly speaking, hold the scales evenly between them.' But such questions cannot be decided by the application of any abstract principle; and their decision involves a special knowledge of the administrative issues involved and an appreciation, based on past experience, of the influence which any particular decision is likely to have on future administrative policy. It is difficult to see to whom the decision

<sup>1</sup> C.M.P., Minutes of Evidence, Vol. 2, p. 1, para. 5; p. 2, para. 7.

<sup>2</sup> Page 16, para. 3.

<sup>3</sup> Page 15, para. 1.

in such matters could be given except to the Department administering the legislation in question. 'The disputes being non-justiciable, there is no room for the jurisdiction of the courts; and a layman casually selected would not have the necessary technical knowledge. It is clear, also, that the decision in many of these cases must necessarily, and rightly, give expression to Departmental policy on the particular points involved.'<sup>4</sup>

Despite the apparent ease with which the Treasury Solicitor was able to contrast judicial and quasi-judicial powers, he admitted that it is often difficult to distinguish clearly between administrative and quasi-judicial functions, and between those which are quasi-judicial and those which are strictly judicial. Judicial decisions, he said, are based on law, quasi-judicial decisions on discretion—'an administrative and impartial discretion'.<sup>5</sup> But is there no discretionary element in the law, and no element of legality in discretion? It was Sir Maurice Gwyer's failure to ask or to answer these questions that revealed the superficial nature of his analysis. Asked by Sir Ellis Hume Williams, K.C., whether an individual should have a right of appeal to the court against a ministerial order where the department had abused its powers, he inquired whether such an application would have to be justified on grounds of law or of policy. Sir Ellis replied: 'On grounds of what I call a miscarriage of justice, on grounds of justice. The Department should show that their decision was not only within their powers but also that it was desirable'. 'That', answered Sir Maurice Gwyer, 'is putting a duty on the court which, with the greatest respect, I say is not the concern of the court.'<sup>6</sup> There was no attempt on the part of either of these eminent lawyers to give any precise content to the

<sup>4</sup> Pages 15-16, para. 1.

<sup>5</sup> Page 22, Q. 247.

<sup>6</sup> Page 29, Q. 412-413.

words 'law', 'policy', 'justice' or 'desirable'. Yet the whole discussion turned fundamentally on discovering the true meaning to be attributed to these loose terms.

Sir Maurice Gwyer had no difficulty in explaining the reasons which had led Parliament to entrust judicial functions to administrative tribunals (a term to which he objected). Cheapness, expedition, ease of access, freedom from technicalities of procedure, the possession of technical knowledge, the need for uniformity and co-ordination, were, he pointed out, the advantages offered by such tribunals as compared with the courts.<sup>7</sup> He declared his firm conviction that the existence of departmental tribunals had, on the whole, been beneficial, and that their action had been both fair and just. It would, he said, be difficult to find any actual instances where a member of the public could be shown to have suffered injustice or prejudice at their hands.<sup>8</sup>

The two most important features of the Treasury Solicitor's evidence were, first, his spirited defence of civil servants and his denunciation of the allegations of deliberate lawlessness on their part as mere quackery.<sup>1</sup> Second, his indiscriminating and uncritical classification of judicial and quasi-judicial powers according to whether they are based on 'law' or 'policy'. Whether his readiness to distinguish the judicial from the quasi-judicial was due to the fact that this distinction was made in the committee's terms of reference; and whether, as the Government's principal legal adviser at the official level, he had any part in drafting these terms of reference, are questions which cannot be answered from the record. But, as we shall see later, the committee accepted Sir Maurice Gwyer's testimony on both these matters.

<sup>7</sup> Page 16, para. 3.

<sup>8</sup> Page 17, para. 11.



## THE MINISTRY OF HEALTH'S EVIDENCE

Of the contributions made by the great departments of State, the evidence of the Ministry of Health was by far the most interesting. This was due partly to the fact that the Ministry of Health was at that time exercising a greater number and variety of judicial powers than any other department and, therefore, had more significant material to disclose concerning its methods and procedure; and partly owing to the exhaustive oral examination of the Ministry's witnesses. The Ministry was represented by Sir Arthur Robinson, its permanent secretary, and Mr. E. J. Maude, its solicitor and legal adviser, who subsequently (as Sir John Maude) succeeded Sir Arthur Robinson as official head of the department.

The memorandum submitted by the Ministry of Health attempted to classify the Minister's functions of a judicial nature according to whether the issues are justiciable or non-justiciable. A justiciable issue involves the ascertainment of facts and the application thereto of definite legal principles without any considerable element of discretion. The non-justiciable issues involve deciding questions of fact (and sometimes of law) between conflicting parties; but, presumably—though this was never stated explicitly by the witnesses—a substantial element of discretion enters into the decision.<sup>9</sup>

The department suggested, as examples of justiciable issues, disputes regarding settlement and chargeability under the Poor Law; questions of insurability under National Health Insurance; appeals under the various pensions Acts; appeals arising out of the decisions of the district auditor; decisions under various statutes relating to compensation to officers for loss of office; and decisions on superannuation matters. As illustrations of non-justiciable issues, the witnesses mentioned the transfer of

<sup>9</sup> Page 126, paras. 3 and 4.

powers by ministerial order from one local authority to another; the approval or disapproval of loan sanctions required by local authorities to enable them to undertake public works of various kinds, such as sewers, roads, parks, housing schemes, and so forth; the confirmation of compulsory purchase orders for land; the confirmation of slum clearance schemes under the Housing Act, 1925; and disciplinary action against panel doctors participating in the National Insurance Scheme.<sup>1</sup>

It is very doubtful whether some of these so-called non-justiciable issues ought properly to have been included in a conspectus of the Minister of Health's judicial powers. For example, the granting of permission to a local authority to borrow money is essentially a matter of administration rather than of adjudication. There is not usually a controversy in existence nor any parties in dispute. The principal matters to be decided are whether the local authority's financial position is such as to warrant further capital expenditure; and whether the purposes on which the proposed loan is to be expended are sound and well conceived. The transfer of powers from one local authority to another may similarly be a matter of straightforward administration rather than of adjudication. If one local authority 'claims' to be allowed to exercise the powers and another resists or objects, the matter will then become a question of adjudication. But if both authorities agree that there should be, or should not be, a transfer of powers, the Minister will then be acting in an administrative capacity, rather than a judicial one, in making his decision. Any other view makes nonsense of the distinction which has here been drawn between judicial and administrative functions.<sup>2</sup> Dr. Jennings shares the views of several French writers on public law that there is no distinction

<sup>1</sup> Pages 126-127.

<sup>2</sup> *Ante*, p. 18.

between administration and adjudication, but I do not agree with this contention.<sup>3</sup>

The Ministry of Health also gave instances of appellate functions vested in the Minister in which, 'though in form the function is clearly of a judicial character, the issues are almost wholly questions of fact and policy'.<sup>4</sup> These included appeals under town planning interim development orders; appeals against closing and demolition orders under the Housing Act, 1925; appeals under section 268 of the Public Health Act, 1875<sup>5</sup>; appeals against charges incurred in connection with private street works; appeals under the Nurses' Registration Act, 1919, against a refusal by the General Nursing Council to approve an institution for training, and appeals under the Nursing Homes Registration Act, 1927, against a refusal by a local authority to exempt a hospital from the operation of the Act.

In each of these instances a substantial degree of discretion is vested in the Minister, which means, in practice, that he can adopt and follow a policy if he so wishes, though he need not do so. It is not clear whether the Minister's representatives were implying that these appellate functions were also non-justiciable.

The term 'non-justiciable' is a misnomer to employ in connection with departmental powers. It means, literally, 'not liable to be tried in a court of justice; not subject to jurisdiction'.<sup>6</sup> Obviously all the matters which are by law to be determined by the Minister of Health are subject to his jurisdiction—that is, they fall within the scope of his power or authority—irrespective of whether he is given a wide or narrow discretion in the manner of dealing with them. It is equally obvious that where the Minister is given power to adjudicate on a specific matter,

<sup>3</sup> W. I. Jennings, *The Law and the Constitution*, Chap. 1.

<sup>4</sup> Evidence, Vol. 2, p. 127, para. 6.

<sup>5</sup> Now repealed, see pp. 108-9.

<sup>6</sup> *Murray's Oxford Dictionary*, vide 'Justiciable'.

that question will not normally be liable to be tried in a court of justice, save where the court and the Minister are given concurrent powers,<sup>7</sup> or unless there is a right of appeal. Hence, it is a misuse of language to say that an issue is 'non-justiciable' merely because the adjudicating authority is free to determine the matter by the light of an unfettered discretion; and equally incorrect to say that an issue is 'justiciable' when there happen to be clear rules of law available to be applied to it. I shall argue later that the assumption that the law consists of a collection of ready-made rules ready to be applied to every situation is an entirely false conception; but I am at present concerned only to show the absurdity of confusing the justiciability of an issue with the degree of discretion possessed by the authority which has power to decide it.

The weakness of this approach can be demonstrated by a further test. It would be both possible and easy for the Minister to lay down a series of rules embodying the principles on which he intended to base his decisions in regard to each one of the so-called 'non-justiciable' issues. Assuming that the Minister's discretion or policy was thus formulated and applied, would the issues then become 'justiciable'? The evidence of Sir Arthur Robinson and Sir John Maude implies that they would. Which, as Euclid would say, is absurd, if language has any meaning and law any historical evolution.

Comparing the evidence of the Treasury Solicitor with that of the Ministry of Health it appears that what the former called judicial powers the latter termed justiciable issues; while what Sir Maurice Gwyer referred to as quasi-judicial powers correspond to what Sir Arthur Robinson called non-justiciable issues.

The Ministry's witnesses stated that if the power to decide these non-justiciable issues, which involve 'fact and policy and perhaps a little law', were taken away

<sup>7</sup> As, for example, under the Audit (Local Authorities) Act, 1927.

from the Minister of Health and given elsewhere, his effectiveness in carrying out the policy which it is his duty to carry out would be impaired.<sup>8</sup> Nevertheless, the department had tried to shed some of the powers. Sir Arthur Robinson explained that he had wanted for some time to get rid of his department's appellate jurisdiction in regard to closing and demolition orders applicable to individual houses because he found it meant 'keeping a rather highly paid technical staff which was under the liability of going down to some distant place to look at one house and it seemed to me that was rather a waste of good technical material'. He had tried both in 1923 and 1924 to transfer the Minister's powers to the county court but had been prevented from doing so by strong resistance.<sup>9</sup> The opposition was grounded on the varying decisions which would result from county court judges. This disclosure was an interesting sidelight on Lord Hewart's accusations against the despots of Whitehall!

#### THE AUTHOR'S EVIDENCE

I come now to my own evidence before the committee. The written memorandum<sup>1</sup> which I was invited to submit was mainly a summary of the arguments and proposals contained in the first edition of this book, which the committee informed me they had read.

The chairman, taking me through my memorandum in the usual manner at official inquiries, asked: 'In fact, does it not almost amount to a substitution of a court, not *the* courts, but *a* court, for the present administrative system?' I answered that I thought my proposals would provide an institutional framework within which administrative decisions of a judicial character would be reached.<sup>2</sup> The Earl of Donoughmore was evidently thinking of the

<sup>8</sup> Evidence, Vol. 2, p. 156, Q. 2274.

<sup>9</sup> Page 150, Q. 2166. The transfer to the county courts was made in the Housing Act, 1930.

<sup>1</sup> Evidence, Vol. 2, pp. 51-53.

<sup>2</sup> Page 55, Q. 756.

administrative appeal tribunal which I proposed rather than of the departmental administrative tribunals which I had also advocated, but I intended my answer to his question to cover all my suggestions. Undoubtedly the essential issue which confronted the committee was raised in that early question and answer. Professor Laski looked at the issue from the standpoint of the parties concerned when he asked: 'Your view in fact is that a claimant in a particular case, whether it is a person or a local authority, who appears before the Minister will not be satisfied with this type of jurisdiction unless he has a tribunal as recognisable in personnel as the tribunal of an ordinary court?' I agreed in substance with this.<sup>3</sup>

In the written evidence I had not described in any detail my proposal for an administrative appeal tribunal. In oral examination I suggested that this might take the form of an administrative court grafted on to the Privy Council, analogous to its Judicial Committee, and composed of high administrative officers (who might include ex-government lawyers) and perhaps former Ministers, colonial administrators, ex-Members of Parliament, and other eminent persons with experience of public life. They would be drawn from appropriate panels according to the type of case.<sup>4</sup> I hoped that this device would commend itself to the committee as a development in line with our constitutional tradition. It would also have had the merits of flexibility. There would have been one general administrative court of appeal hearing appeals from all departments with a personnel which might be varied slightly to meet the different kinds of cases it would be called upon to hear.<sup>5</sup>

<sup>3</sup> Page 58, Q. 823.

<sup>4</sup> Page 58, Q. 830.

<sup>5</sup> Page 59, Q. 856. This proposal has the support of Dr. R. M. Jackson in his admirable book *The Machinery of Justice in England*, p. 300, where he writes: 'There is much to be said for a system of appeals from ministerial tribunals, and (if the contention that appeal to the law courts is in general not satisfactory is accepted) the solution would appear to be an appellate tribunal staffed from various departments. Com-

At the departmental level I urged the desirability of establishing properly constituted administrative tribunals possessing the institutional characteristics necessary to enable judicial functions to be performed in a satisfactory manner. The jurisdiction of such tribunals would mainly relate to questions requiring adjudication in connection with the administration of social services, such as education, housing, public health, national insurance, and so forth. These I called service functions, as distinct from the purely regulatory functions, which correspond broadly to what are known as police powers in the United States.<sup>6</sup> Where the judicial functions coming within the scope of a single department are very extensive and diverse, there would be no objection to the creation of several administrative tribunals to share the work between them.<sup>7</sup> The personnel of the tribunals would include persons drawn from outside the department.<sup>8</sup> The administrative tribunals would form a self-contained system and there would be no appeal on questions of law to the ordinary courts.<sup>9</sup>

Disputes arising in connection with the regulatory functions of government, such as the grant or refusal of licences, permits and similar instruments; the enforcement of regulatory legislation like the Factories Act, Shop Acts, Minimum Wage Act, etc., would remain within the courts of law. This division may not be the best possible one in all circumstances but it could at least form the basis of discussion. I did not intend it to be more than a rough guide. It was in no sense an essential part of my evidence.<sup>1</sup>

plainants would be better off than they are now, for they would have an appeal tribunal with a definite composition, a wide experience, and presumably an ascertainable and predictable set of principles'.

<sup>6</sup> Page 63, Qs. 915-917. Cf. Ernst Freund, *The Police Power*.

<sup>7</sup> Page 63, Q. 925.

<sup>8</sup> Page 63, Qs. 927-928.

<sup>9</sup> Page 59, Q. 841.

<sup>1</sup> Pages 89-91, Qs. 1264-1292.

Sir Ellis Hume-Williams, K.C., stands out in my memory of the committee's proceedings as a distinguished member of the Bar honestly struggling to understand an approach to the subject which seemed to lie almost beyond his comprehension. After I had been expounding my proposals for some time he asked me: 'What you would be doing then would be, would it not, to establish in departments an entire judicial system?' To which I answered: 'That is my aim'.<sup>2</sup> His next question was: 'Considering the experience of the courts of law, and that they are already in existence and functioning, is there any objection to the appeal at any rate going to a court of law, except that you fear they may be wanting in administrative experience?' The sheer naivety of this suggestion almost took my breath away. I managed, however, to regain it sufficiently to answer: 'I think that there are very considerable objections. As I understand it, we are faced with the position in which there is a vast mass of judicial functions being exercised by government departments without appeal to the courts. The question arises as to whether any appeal is desirable, and, if an appeal is desirable, whether what I have called the old and obvious remedy of giving that appeal to the courts should be adopted. I have given this matter the most careful attention that I am capable of, and I do believe that it is not really going to be in the best interests of the public to throw open these extraordinarily vulnerable aspects of public administration to the judicial process in the courts of law. That process is extremely valuable in its own way, but it was evolved in circumstances which were entirely different from the circumstances with which the State has now to cope, and I believe that to deal with the matter in that way would

<sup>2</sup> Page 60, Q. 858.



result in immense impediment being placed in the way of efficient government'.<sup>3</sup>

Sir Claud Schuster, K.C., permanent Secretary to the Lord Chancellor from 1915 to 1944, gave me the impression of being the member of the committee who had given least thought to the problem, and the one who was least able to express himself coherently. It was almost impossible to keep to the point with him, as he was always going off at a tangent. After a long and rambling interrogation, the drift of which it is impossible to discover even from the printed record, he asked: 'Is really anything more required, in the kind of cases we are talking about now, than the application of an honest mind under the guidance of somebody else, who, it is admitted, cannot possibly know all the things which are done but is responsible for seeing that an honest mind is preserved and a certain policy followed? How can you substitute for that a number of people?' I replied: 'There is a very large difference between a responsible body and this vast anonymity'.<sup>4</sup>

*Sir Claud Schuster*: 'One realises of course that there is a difference.'

*Myself*: 'In fact, I venture to say that everybody knows there is a difference between seeing your appointed tribunal and merely having a letter from the Minister saying that he has taken into consideration your representation and "I am directed to inform you that the Minister has decided so and so". You do not know who has decided. You imagine the papers have been handed round the department and that some underling has done it. There is a very large institutional and psychological difference between that and having a definite tribunal. The parties would see the tribunal, they would also have an opportunity of knowing what was said against them;

<sup>3</sup> Page 60, Q. 859.

<sup>4</sup> Page 66, Q. 995.

and, what I regard as being fundamental, they would know the grounds for the decision after it has been made, and they would know the principle which the tribunal would follow before it was made; and furthermore, I think it is essential—but you think it is unimportant—you should be able to get the substance of the decision reviewed in important cases by a higher tribunal'.<sup>5</sup>

Obviously no light could emerge from a discussion in such loose terms as these. To talk about applying 'an honest mind' under the 'guidance' of someone who has no idea of what is being done and no personal knowledge even of the officials engaged in the work; but who is 'responsible' for seeing that 'a certain policy' is followed—remarks of this order are a mere substitute for thought.

By contrast, my examination by Sir John Anderson, to which an entire meeting of the committee was devoted, raised the discussion to a very high level of political and juridical debate. Sir John was then Permanent Under-Secretary of State at the Home Office and at the height of his powers as an official. His political career had not yet started and I gained the impression that he was intent only upon eliciting the greatest possible amount of truth from our discourse.

We agreed across the table that many acts done by judges in courts of law are really administrative in their nature; and hence that the title of a public officer cannot be relied upon to indicate the character of the functions which he performs.<sup>6</sup> I assented also to his proposition that the activities of a public authority begin to acquire a judicial character when they are concerned with the settlement of a dispute or controversy between other parties<sup>7</sup>; yet such activities may nevertheless properly be entrusted to an administrative organ.<sup>8</sup> Moreover, a

<sup>5</sup> Page 66, Q. 996.

<sup>6</sup> Page 83, Qs. 1134-1138.

<sup>7</sup> Page 83, Q. 1147.

<sup>8</sup> Page 84, Q. 1151.

question may in its inception be purely administrative but later come to acquire a judicial character.<sup>9</sup> Many questions calling for decision combine both judicial and administrative aspects.<sup>1</sup> In some cases the element of policy in the decision is relatively insignificant while at the other end of the scale there are cases in which policy is of vital importance.<sup>1</sup> I agreed further that in order to ensure a satisfactory discharge of judicial functions by administrative bodies it is necessary to ensure three things. First, that the facts should be properly ascertained. Second, that the law should not be transgressed. Third, that the policy should be such as would commend itself to Parliament.<sup>2</sup>

There ensued the following almost Socratic dialogue :—

Q. 'And would it not, in your opinion, conduce to clearness on this matter if we were able to keep those three elements, as far as possible, distinct?'

A. 'It would certainly.'

Q. 'They are all quite different?'

A. 'Entirely.'

Q. 'The ascertainment of the facts, the introduction of safeguards to ensure that the law should not be broken, and the matter of policy?'

A. 'Yes.'

Q. 'I am venturing to put to you that it might be more fruitful for us to proceed on those lines rather than to try to draw up a series of specific safeguards or desiderata having regard to the enormous variety of the questions which may have to be provided?'

A. 'I think that the principles you have laid down are desirable principles which one should follow. But the translation of those principles into institutional form becomes necessary.'

<sup>9</sup> Page 84, Q. 1157.

<sup>1</sup> Page 84, Qs. 1171-1172.

<sup>2</sup> Page 84, Qs. 1174-1175.

Q. 'It is when I come to the institutions I begin to be in difficulty. . . .'

At this point agreement ended and an essential difference began to appear between my own approach to the problem and that which motivated Sir John Anderson. Our divergence was due to two separate causes. In the first place, I was convinced (as I still am) that the exercise of judicial functions by administrative bodies can be rationalised and disciplined only by the introduction of specific institutional reforms and procedural safeguards in the machinery of adjudication. Sir John Anderson, on the other hand, shrank from the idea of imposing on the departments requirements which he feared might impede efficient administration and commit them to less flexible methods.

In the second place we differed on the subject of discretion. In my view one can distinguish 'policy' from 'law' only in theory, and even then the distinction is doubtful. In practice, the judge has been for centuries and still is today, a maker of policy. A great part of the law consists of judicial policy embodied in cases. These cases form judicial precedents for other decisions and in that way the judges' freedom of choice becomes limited by the necessity to maintain consistency and coherence in the law. In Sir John Anderson's eyes judicial policy is the law while administrative policy is something outside the law and must remain distinct from it. The following questions were significant :—

*Sir John Anderson* : 'But the policy of the law is really the law, is it not, it is not an administrative policy, it is not something you can separate and put into a different category?'

*Myself* : 'It is the judicial discretion of the court which

has become crystallised into certain general principles, and is then observed in place of the undefined discretions'.<sup>5</sup>

*Sir John Anderson* : 'There is an element of discretion in decisions of various kinds. There is a much larger element, I suggest, of policy in quasi-judicial decisions given by public departments. Is there not a much larger element of discretion, for example, in a decision with regard to slum clearance or town planning?'

*Myself* : 'Yes, it includes a large element of discretion. But the judges have in regard to certain matters an extremely wide discretion, almost a complete discretion'.

*Sir John Anderson* : 'Will you illustrate that?'

*Myself* : 'Divorce for example. Take also the case of an obscene publication, it seems to me the discretion of the magistrate is almost complete in such a case'.

*Sir John Anderson* : 'Has he any discretion at all? Is he not bound by the decision in a leading case, as to what constitutes obscenity, and has he not to apply that to the facts laid before him? These things go to a magistrate, the magistrate is the judge in that particular case. I do not think he has much discretion. He may find it a difficult task to make up his mind, but that is not discretion'.

*Mr. Gavin Simonds* (now Lord Simonds) : 'You have helped us so much that I want you to help us a little more. Supposing upon the ascertainment of the facts "yes" is the answer, and on application of the law "yes" again is the proper answer, but the answer dictated by policy is "no". Is that your point?'

*Sir John Anderson* : 'No, I should say that in that case you have eliminated policy. If the facts and the law dictated the answer "yes", I do not see what room there is for policy. That seems to be a simple and extreme case'.

<sup>5</sup> Page 87, Q. 1218.

*Mr. Gavin Simonds*: 'That seems to be the way of dividing up these categories'.

*Sir John Anderson*: 'But you have taken the limited case from which policy is absent. Take a simple concrete case of the suggested removal of a doctor from the insurance panel. That is effected normally after an oral hearing by the decision of the Minister. Certain facts are represented with regard to the doctor's conduct. There must be a hearing, and appropriate steps must be taken to determine what facts are established. The element of law in the case is almost entirely absent, it goes only with the question of jurisdiction and appropriate procedure, but the element of discretion is very large, the facts do not point to the answer "yes" or "no". Take the concrete case of the doctor who has been, it has been established, in the habit of breaking the terms of his insurance contract by taking payments to which he was not in law entitled from the insurance patients whom he attended. Now when the facts are ascertained the question that arises is a question of policy. Is it consistent with the proper administration of the insurance service that a doctor who had been guilty of such an abuse should be allowed to remain on the panel? I suggest that that decision must be governed by considerations of policy'.

*Myself*: 'Yes'.

*Mr. Gavin Simonds*: 'I quite follow that, but that is quite a simple case'.

*Sir Ellis Hume-Williams*: 'You get the same thing in divorce cases; it is purely a question of discretion. If adultery on the part of the petitioner is proved the judge has pure discretion founded on policy'.

*Sir John Anderson*: 'Might I ask whether in every case, the judge, when he exercises his discretion, is at pains to explain his reasons for it?'

*Sir Ellis Hume-Williams*: 'He would not exercise his discretion in those cases without saying why'.

*Sir John Anderson* : ' I think I will leave that for the moment '.

*Myself* : ' I think that there are a number of well-defined branches of the law where the court has almost unlimited discretion, but has nevertheless evolved some body of principles with regard to the exercise of that discretion '.\*

Underlying this part of my examination was a fundamental divergence of aim. *Sir John Anderson* was anxious for Ministers and their officials not only to retain an unfettered control over ' policy ' in the exercise of judicial powers, but also to leave them free from any obligation to disclose their policy or even to formulate it. I, on the other hand, considered it desirable to limit the ' policy ' element in administrative adjudication to the extent of requiring Ministers to state their policy in an open letter of reference to the administrative tribunal. The document would constitute the whole extent of Ministerial control or direction over the work of the tribunal.

As we shall see later, it was on this distinction, utterly false to my mind, between law and policy, that the committee based its report. I suspect that *Sir John Anderson's* influence with his colleagues must in this connection have been very great.

#### THE EVIDENCE OF THE NATIONAL FEDERATION OF PROPERTY OWNERS

The great surprise of the inquiry was the evidence given by the National Federation of Property Owners and Rate-payers. This body represented the owners of more than £1,000 millions capital invested in industrial, trading and residential property throughout the country.

The owners of property have been subjected to a rapidly increasing amount of governmental intervention since the passing of the Public Health Act, 1875. During

\* Page 87, Qs. 1221-1225.

the present century interference with the rights of property owners has proceeded from measures designed to promote public health to those intended to improve housing, eliminate slums, restrict rent, protect tenants from eviction, promote town planning and control development. At every stage of this painful journey from *laissez faire* to social control the property owner has come into contact with medical officers intent upon the public health, local authorities oblivious to his feelings, and central departments charged with administering legislation adverse to his financial interests. Was it surprising that their spokesman should inform the committee that property owners viewed with grave alarm the growing powers of Government departments and local authorities? 'In particular', he declared, 'they are averse to Parliament placing in the hands of a department the power to create new offences, to impose penalties, to interfere with the liberty of the subject, to abrogate rights of property and impose new burdens.'

The property owners had not attempted to hit back, for their position resembled that of a fish caught on a hook rather than of a pugilist in the boxing ring. But they had resisted with all their might. The principal arena of resistance (apart from Parliament, which was proving more and more unsatisfactory from their point of view) was the courts of law. There they might expect to find an atmosphere congenial to individual rights; a vast panoply of legal learning and forensic skill available for their protection; and an accumulation of doctrines of uncertain age, doubtful lineage and ambiguous meaning which could at least blunt, if not defeat, the spearhead of the attack.

Dr. Jennings has shown that, far from their expectations being disappointed, property owners achieved ever-increasing success in their forensic conflicts over housing



legislation with the Minister of Health and local authorities. This was specially noticeable after 1928, when 'a new spirit prevailed'.<sup>8</sup> This was possibly due in part to the campaign conducted by Lord Hewart in *The New Despotism* and by Mr. C. K. Allen in *Bureaucracy Triumphant*. Whatever its cause it produced a change of mental climate in the courts favourable to the property owner. It led to the Court of Appeal in 1929 giving 'a slight bias against administrative authorities which became heavier in the subsequent cases'.<sup>9</sup> It led to Mr. Justice Swift, who heard most of the housing cases in the King's Bench, observing: 'When an owner of property against whom an order has been made under the Housing Act of 1930 comes into this court and complains that there has been some irregularity in the proceedings and that he is not liable to have his property taken away, it is right, I think, that his case should be entertained sympathetically, and that a statute under which he is being deprived of his rights to property should be construed strictly against the local authority and favourably towards the interest of the applicant . . .'.<sup>1</sup>

In these circumstances it was not in the least surprising that the National Federation of Property Owners should demand that the appellate jurisdiction of Ministers and their departments should cease.<sup>2</sup> What was remarkable was that the Federation asked for the judicial functions hitherto exercised by government departments to be transferred henceforth not to the ordinary courts of law but to a special tribunal consisting of a legal chairman and two other members selected from a panel to be approved by the Lord Chancellor. The chairman would be salaried and give his full time, the other members

<sup>8</sup> W. Ivor Jennings, 'Courts and Administrative Law—The Experience of English Housing Legislation', 49 *Harvard Law Review*, 426.

<sup>9</sup> In *R. v. Minister of Health, Ex p. Davis*, [1929] 1 K.B. 619; *Jennings, op. cit.* p. 445.

<sup>1</sup> *Re Bowman, South Shields Clearance Order*, [1932] 2 K.B. 621.

<sup>2</sup> *Evidence*, Vol. 2, p. 71.

would serve occasionally and would give their services on a voluntary basis. The latter would consist of 'persons who could bring their administrative experience to bear on administrative matters'. At least one member of the tribunal should have administrative experience.<sup>3</sup>

This administrative tribunal would have power to hear appeals against the decisions of local authorities on grounds both of law and of equity. The legal grounds would be that the requirements of the statute had not been complied with; or that the local authority had acted *mala fide* or with prejudice; or that it had been influenced by extraneous matters. The equitable grounds would be that the local authority had acted harshly, inequitably or unreasonably; or that the appellant was unable to comply with the order or decision owing to lack of means. An appeal would lie to the High Court from a decision on a legal ground but not from one based on an equitable ground.<sup>4</sup> The administrative tribunal would take over not only judicial functions exercised by government departments but also the jurisdiction of the county court judges and the courts of summary jurisdiction in respect of appeals from the decisions, acts or orders of local authorities.<sup>5</sup>

The witnesses made it clear that the Property Owners' Federation was not seeking to interfere, to a greater extent than is at present possible, with questions of policy in the sphere of local government. 'All we ask', they said, 'is that where an administrative act involves in part the performance of a judicial function, that judicial function shall be performed judicially. If it is an administrative act, all we ask is that the court shall have power to keep the local authorities strictly within their powers.'<sup>6</sup>

<sup>3</sup> *Ibid.* and p. 77, Qs. 1058-1059

<sup>4</sup> Page 70, and p. 78, Q. 1069.

<sup>5</sup> Page 78, Q. 1063; p. 93, Q. 1299.

<sup>6</sup> 7' "

The difficulty of separating questions involving 'policy' from those involving 'law' or 'equity' became abundantly clear as the examination of the witnesses proceeded. 'Must you not exclude from the ambit of appeal to this external tribunal any subject which raises a question of policy?' asked Mr. (now Lord) Simonds. 'No, Sir', replied Mr. Hill, standing counsel for the Property Owners' Federation, without attempting to reconcile this answer with the avowed intention of his organisation to eschew appeals on matters of policy.<sup>7</sup> In hundreds of cases, he continued a little later, a right of appeal to the administrative tribunal could be given simply on the question whether the proposed works or other requirement made by the local authority or the property owner, was unreasonable. But, objected Lord Simonds, the word 'unreasonable' implies a standard, and it must surely be a matter of policy to fix that standard. Who is to decide whether a thing is unreasonable?<sup>8</sup>

The witnesses for the property owners agreed with Sir Leslie Scott that there are three categories of cases: those raising questions of law; those involving disputed issues of fact; and those where the inequitable treatment of a citizen is alleged. He thought these could be called justiciable questions. Apart from these are cases which involve questions of administration or policy. These fall into a different category since they are not suitable for adjudication by a court.<sup>9</sup>

'The difficulty arises', asked Sir Leslie Scott, 'does it not, from the fact that questions of policy and justiciable questions, and questions of fact of one sort or another get mixed up?' To which the witness for the property owners replied with perfect truth: 'That is the difficulty'.

*Sir Leslie Scott*: 'Have you considered at all how

<sup>7</sup> Page 94, Q. 1327.

<sup>8</sup> Page 95, Q. 1332.

<sup>9</sup> Page 98, Q. 1408-1411.

questions that go to the special tribunal would be justiciable—questions of fact or a matter of hardship—and how far they would be questions of administration and policy, and if you agree that they would be mixed up, what is your method for dissecting them so as to leave the question of policy to the Ministry and not leave it to the decision of some body not responsible to Parliament?'.<sup>1</sup>

*Mr. Hill* (National Federation of Property Owners): 'If once you get the position where they are mixed up there is no way, in my opinion, of separating them as far as I can see. . .'.<sup>1</sup>

*Sir Leslie Scott*: 'Do you not agree that a great deal of this system of Ministerial adjudication with which we are for the moment dealing has grown up just because of the difficulty of dissecting problems, and separating purely administrative questions, and questions of policy, from justiciable issues?'.<sup>2</sup>

*Mr. Hill*: 'Yes, I agree with that'.<sup>2</sup>

And so it went on. The arguments for separating 'law' from 'policy', the attempts to distinguish 'justiciable' from 'administrative' questions became more involved, more unreal and more impracticable as the examination proceeded. The witnesses and members of the committee chased one another round in circles, for both accepted with equal readiness the false assumptions on which the arguments were based.

But however confused this aspect of their evidence might be, the outstanding fact was that the National Federation of Property Owners and Ratepayers had expressed a clear and unequivocal desire for a series of properly constituted administrative tribunals, which would take over the functions of a judicial nature

<sup>1</sup> Page 99, Q. 1436.

<sup>2</sup> Page 100, Q. 1440.

exercised by Ministers, on the one hand, and the jurisdiction of the county courts and courts of summary jurisdiction in appeals arising from local government administration on the other. Their equitable jurisdiction would be final and conclusive; and so, too, would be their findings of fact. Only on questions of law would a right of appeal lie to the High Court.

Whatever might be the merits of these particular proposals, administrative justice had certainly come into its own. It could no longer be represented—or misrepresented—as a cruel instrument of oppression sought after only by those unprincipled disturbers of our constitutional peace and orthodoxy who had nothing to lose but their heresies. The soothing doctrine that the traditional court system expresses in living form the final perfection of human justice, as well adapted to deal with the complex issues of modern government as with the older branches of private law, was rudely shattered by this unexpected defection on the part of the property owners' association.

The committee was apparently either unmoved by this betrayal of Dicey's most cherished doctrines, or unaware of its significance. Their report contains no indication that the essential issues arising from this part of their terms of reference were fully understood.

#### DICEY AND THE RULE OF LAW

'The supremacy or rule of the law of the land', the report states, 'is a recognised principle of the English Constitution.'<sup>3</sup> The committee accepts as 'the best exposition of the modern doctrine' that given by Dicey, who declared it to have three different meanings. First, it means the absolute supremacy of regular law as

<sup>3</sup> Report, p. 71.

opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the Government. It means, second, equality before the law, or 'the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts'. Thirdly, it means that our constitutional law is not the source but the consequence of 'the rights of the individual as defined and enforced by the courts'.<sup>4</sup>

The first of these conditions is so manifestly remote from the state of affairs which has existed, at any rate for the past century, that it is obviously untrue in any large sense. Every government possesses, and must possess, 'wide discretionary authority'; and the importance of the prerogative can scarcely be over-emphasised in England of all countries, where the entire field of foreign affairs, to take only one instance, falls within its scope. It is, however, the second condition which is of chief significance in connection with the present discussion.

The doctrine that all classes in this country are subject equally to the ordinary law of the land administered by the ordinary courts of law, is a proposition which is utterly untenable unless it is admitted that 'the ordinary law of the land' makes such colossal distinctions between private law and public law that the administrative organs of government possess entirely different rights, powers, duties and liabilities from those possessed by private persons and institutions. The income tax legislation places the Inland Revenue authorities in a completely different position from that of a private person collecting a debt. The Postmaster General does not carry on the telephone service, or the carriage of mail, under the ordinary rules of contract and tort, but under a special

<sup>4</sup> Page 72.

body of administrative law.<sup>4a</sup> The central departments and local authorities responsible for education, public health, housing, town and country planning, highways, the regulation of factories and shops and many other services, derive their powers from a series of vast statutes dealing with these subjects for which there is no counterpart in private law. Neither Dicey nor the Committee on Ministers' Powers say whether this huge mass of legislation relating to public administration is included in 'the ordinary law of the land'.

Even if, by straining the meaning of words, it is included, Dicey's second proposition would still be nonsensical, for public authorities possess special advantages in the ordinary courts of law compared with private citizens.

The immunity of the Crown from liability in tort which has hitherto applied not merely to the acts of Ministers and Departments of State, but also to those of such relatively humble figures as borough constables, was so glaring an instance of State privilege prior to 1947 that even the blindest believers in the orthodox theory were compelled to denounce it as an 'anomaly'; and the committee went out of its way, and even outside its terms of reference, to commend a Bill to fill this 'lacuna in the rule of law'.

Happily this grave defect in our system of law has at long last been rectified by the Crown Proceedings Act, 1947. The main objects of this statute are to make the Crown liable in tort and to reform the ancient rules of procedure governing civil litigation by and against the Crown. It constitutes a measure of elementary justice

<sup>4a</sup> The explanatory memorandum attached to the Crown Proceedings Bill stated that 'in regard to certain matters (*e.g.*, the defence of the realm, the maintenance of the armed forces of the Crown and the postal services) the analogy between the Crown and the subject breaks down, for in these spheres the functions of the Crown involve responsibilities of a kind no subject undertakes'.

which is highly desirable. The Bill was welcomed in all quarters.

It would, however, be misleading to assume that, because the immunity of the Crown in tort has been set aside, Dicey's second proposition concerning the rule of law is now correct. That is far from being the case, for the executive still enjoys a whole series of other privileges in the courts of law: some conferred on it by statutory measures such as the Limitation Act; some by common law doctrines founded on ancient cases, such as non-feasance, whereby a public authority cannot be made liable for its failure to keep a highway in repair even though injury results to citizens; some by the self-limitation of the courts of law, which impels them to refuse to investigate a wide range of executive action; others by the absence of effective legal means to compel public authorities to fulfil the positive duties which they owe to the community, though individual citizens can be and are compelled by law to fulfil their duties towards the executive.

Hence there is little equality before the law, as between government and citizen, in the ordinary courts of justice, for the simple reason that a special body of law, and sometimes special rules of procedure, apply exclusively to public authorities. This body of law operates so as to deprive the citizen of a remedy against the State in many cases where he most requires it. It also enables many of the most important administrative decisions to escape any shadow of review by the courts of law.

The English law of remedies has, indeed, shown a remarkable incapacity to develop so as to meet the needs of the citizen in the modern State. The present law of torts which, combined with the doctrines of *ultra vires* and natural justice, form the main armoury of the law



for this purpose, are utterly inadequate to safeguard the rights of the individual in the twentieth-century State.

English jurists have, unfortunately, for the most part been so preoccupied with the mote in the eye of the executive that they have failed to notice the beam in their own. Their concern at the acquisition of judicial and legislative functions by administrative departments has dominated the discussion of public law questions for the past decade, and has diverted the attention of both lawyers and the general public from the deficiencies of the courts of justice as instruments for controlling, wisely and effectively, the relations between the citizen and the State.

Dicey's third proposition is equally wide of the mark. Only a very small and diminishing fraction of our constitutional law is derived from individual rights defined and enforced by the courts. By far the greater part of our constitutional law is to be found in the rules and traditions which govern the proceedings of Parliament; in the principles and customs on which the Cabinet system is based; in the unwritten functions of the King; and in the statutes which contain the law relating to elections, the appointment and functions of Ministers, the constitution of local authorities and similar matters.<sup>5</sup>

With these considerations in mind, we can now turn to the section of the report dealing with the judicial powers of Ministers.

For nearly three-quarters of a century Parliament has made a practice of conferring, with increasing frequency, judicial powers on Ministers in charge of departments. The legislation relating to public health, education, local government, transport, health insurance, unemployment insurance, pensions and other social services is teeming

<sup>5</sup> For a further demonstration of the fallacies of Dicey's *Rule of Law*, see W. I. Jennings, 'The Report on Ministers' Powers', 10 *Public Administration*, p. 333.

with provisions in which disputes between administrative authorities and householders, parents, employers, insured persons, approved societies, doctors, druggists and other sections of the community are determined, not by the courts of law, but by government departments or by administrative tribunals appointed by Ministers of the Crown. This tendency is not the result of a well-thought out constitutional principle. Its growth was haphazard, sporadic and unsystematic. Yet it was not, on the other hand, due to a fit of absentmindedness. Parliament did not merely overlook the courts of law. But the possibility of setting up new organs of adjudication which would do the work more rapidly, more cheaply, more efficiently than the ordinary courts; which would possess greater technical knowledge and fewer prejudices against government; which would give greater heed to the social interests involved and show less solicitude for private property rights; which would decide disputes with a conscious effort at furthering the social policy embodied in the legislation: this prospect offered solid advantages which has happened again and again in the history not administrative jurisdiction of government departments so as to include judicial functions affecting the social services. In doing so, Parliament was only repeating a process which has happened again and again in the history, not only of England but of many civilised countries.

The committee thus came to be faced with a fait accompli. Broadly speaking, three courses were open to it. It could (in theory, at least) have recommended a return to the eighteenth century position, illustrated by Lord Hewart when he expressed the hope that 'the worst of the offending sections' in Acts of Parliament be repealed or amended. It could have accepted the proposals which I put forward to rationalise and institution lise the administrative jurisdiction in a boldly-

conceived system of administrative courts separated to a large extent from the ordinary work of departments and free from indirect Ministerial interference. Or, thirdly, it could accept the patchwork quilt of ill-constructed tribunals with which it was confronted, and endeavour to remedy some of their more obvious defects.

It was this last-named alternative which the committee adopted. The report contained no recommendations which drastically disturbed the existing structure, nor did it suggest that, in practice, any injustice or hardship had resulted from the existing arrangements.

Indeed, the committee explicitly declares that 'there is nothing radically wrong about the existing practice of Parliament in permitting the exercise of judicial and quasi-judicial powers by Ministers and of judicial power by Ministerial tribunals, but that the practice is capable of abuse, that dangers are incidental to it if not guarded against, and that certain safeguards are essential if the rule of law and the liberty of the subject are to be maintained'.<sup>6</sup>

The committee was not unduly impressed by the need to maintain a strict separation of powers. They rightly pointed out that the separation has never been complete in England; and that the doctrine is not sacrosanct. It is merely a rule of political wisdom and must yield to other considerations where sound reasons of public policy so require. Hence, if a particular task is not suited to the ordinary courts, there is no objection to its being given to a special tribunal better adapted in personnel or procedure to the purpose.<sup>7</sup>

The committee stated that the real questions they had to answer were: first, to what extent should judicial functions be entrusted (i) to Ministers and (ii) to

<sup>6</sup> Report, p. 115.

<sup>7</sup> Pages 94-95.

ministerial tribunals<sup>8</sup>; second, what are the right methods for the exercise of such functions, and what are proper safeguards.<sup>9</sup> The committee did not, however, attempt to answer the first of these questions. They declared, indeed, that that question cannot be answered by any general principle or formula, except that Parliament should always be extremely reluctant to entrust either Ministers or ministerial tribunals with purely judicial powers. In the rare cases where that course has to be considered, the decision of Parliament should normally depend on what is the dominant aspect of the problem to be solved.<sup>10</sup>

#### JUDICIAL AND QUASI-JUDICIAL DECISIONS

Having thus expressed their inability to deal with the more important issue before them, the committee approached the subject on the basis of the distinction between judicial and quasi-judicial decisions. This distinction appeared in their terms of reference, and there was, as we have seen, a great deal of confused evidence on the subject.

A 'true judicial decision', said the committee, presupposes an existing dispute between two or more parties and involves four requisites: (1) the presentation (not necessarily orally) of their case by the parties; (2) the ascertainment of the facts by evidence adduced by the parties; (3) if the dispute is a question of law the submission of legal arguments by the parties; (4) a

<sup>8</sup> The Committee on Ministers' Powers throughout its Report uses the term 'Ministerial Tribunals' to designate specialised tribunals of an informal character appointed by Ministers for the purpose of adjudicating on questions arising in connection with the work of a Government Department, such as Courts of Referees under the Unemployment Insurance Acts, Pensions Appeal Tribunals, etc. It is an unfortunate expression, for as Mr. Gordon remarks, there is no such thing as a Ministerial Tribunal. 'Members of a tribunal may act ministerially, but they do not then act as a tribunal.' D. M. Gordon, 'Administrative Tribunals and the Courts', 49 *Law Quarterly Review*, pp. 96-97.

<sup>9</sup> Page 82.

<sup>10</sup> Page 96.

decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including, where required, a ruling upon any disputed question of law. A quasi-judicial decision, in the committee's view, also presupposes an existing dispute between parties. It always involves the first two requisites. It does not necessarily involve the third; and it never involves the fourth, which is replaced by 'administrative action, the character of which is determined by the Minister's free choice'.<sup>1</sup> Both judicial and quasi-judicial functions presuppose the existence of a dispute between parties, and this feature separates the judicial and quasi-judicial function from the administrative<sup>2</sup>; yet, 'generally speaking, a quasi-judicial decision is only an administrative decision, some stage or some element of which possesses judicial characteristics'.<sup>3</sup> In a later passage the committee cites, as a perfect example of a quasi-judicial decision, a dispute between medical officers of health which must be referred to the Minister of Health for his determination. Here the Minister must give both medical officers an opportunity to present their case. He must ascertain the facts from the evidence adduced by the parties and hear their arguments. It then becomes his duty to decide whether the claim of the county medical officer is reasonable or not, taking into consideration medical policy in local administration. 'In the end the Minister makes up his mind what is *best* to do, and does it.'<sup>4</sup>

There is something almost naïve in the distinction here drawn. The conception of 'the law of the land' as being a complete and perfect structure ready to be applied to every controversy immediately it arises is one of those copybook maxims which one thought had disappeared

<sup>1</sup> Pages 73-74.

<sup>2</sup> Page 75.

<sup>3</sup> Page 81.

<sup>4</sup> Page 91.

generations ago. Did the committee take into account the view of the judicial process put forward by the late Mr. Justice Cardozo? <sup>5</sup> Did they consider the discussion about 'free judicial decision' which had been agitating European jurists for years? Can we be told just when and how the Chancery jurisdiction, for centuries a purely discretionary intervention based on moral and social grounds, became 'truly judicial'? When did the *Conseil d'Etat* become judicial? Surely not when it began to follow precedents, for no court of law on the Continent is bound by previous decisions. Did not the House of Lords do precisely what it thought 'best' to do in the *Taff Vale Case* <sup>6</sup> or in *Sorrell v. Smith* <sup>7</sup> or in the snail in the bottle case? <sup>8</sup> Have not both the common law and equity been developed to an enormous extent by the judges doing what they thought 'best' to do in the cases before them? Was Lord Thring wrong when he said that the negotiability of a bill of exchange was determined by a judicial decision; and that this decision, which soon passed into settled law, amounted to an enactment that bills of exchange are negotiable? <sup>9</sup> What is the fundamental distinction between questions of fact and questions of law? Do not questions of fact involve questions of interpretation, which (as the report itself remarks) are questions of law? <sup>1</sup>

These and a hundred other questions spring to the mind in protest against the false view of history, of legal evolution and of the judicial process implicit in the committee's analysis. It is obvious that the degree of

<sup>5</sup> B. J. Cardozo, *The Nature of the Judicial Process*.

<sup>6</sup> *Taff Vale Ry. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426.

<sup>7</sup> [1925] A.C. 700.

<sup>8</sup> *Donoghue (or M'Alister) v. Stevenson*, [1932] A.C. 562.

<sup>9</sup> Lord Thring, *Practical Legislation*, 2nd ed., 1902, p. 24.

<sup>1</sup> Dr. Jennings points out that the annual value of a house, the assessment of a man's income for taxation purposes, the determination of whether a house is insanitary are questions of law as well as of fact. 'Report on Ministers' Powers' in 10 *Public Administration*, p. 347.

discretion available to adjudicating bodies varies greatly between different classes of cases and different bodies. This is as true of regular courts of law as it is of administrative tribunals. In some classes of action even the House of Lords sitting in its judicial capacity is tightly bound within narrow limits by its own precedents or by legislation; while in other cases it has almost complete latitude to do whatever it wishes, subject only to the need for maintaining the corpus of the law coherent and consistent. The same is true of all courts, whether civil or criminal; and also of administrative tribunals. The notion that a government department or any other form of administrative tribunal is free to follow any whim of the moment under the guise of calling it 'policy' is too ridiculous an assumption to call for serious consideration.

Dr. Jennings goes so far as to say that any case which gets into the law reports implies a new rule of law which is made by the judge before whom the case is heard. 'He is legislating; and he is necessarily legislating in accordance with a policy. He cannot apply law to make new law. The law is not in his breast ready to be pulled out. A judge is not a legal slot machine.'<sup>2</sup>

On what principles, asks Dr. Jennings, does the judge legislate? His first concern is to keep the law, so far as possible, a coherent and cohesive body of principles. If, for example, he has to determine what rule shall apply where an aircraft is burned in the hangar of an aerodrome attached to an up-to-date country hotel, he does not exclaim that an aircraft is *sui generis* and consider in the light of social needs what the law ought to be. He considers whether he ought to apply the law relating to motor cars in hotel garages or the ordinary law of negligence. 'He is considering the desirability, but he weighs

<sup>2</sup> W. I. Jennings, 'The Report on Ministers' Powers' in *10 Public Administration*, pp. 345-346.

social advantage apart from advantages of legal procedure against his anxiety to keep the law consistent. When for the first time a Housing Act or a Derating Act is interpreted, the judge is limited only by the rules of interpretation. Within those rules he makes that decision which seems to him socially most desirable.'<sup>3</sup> There is no objection to his doing this, Dr. Jennings observes, provided he has sufficient knowledge of the subject-matter to form a satisfactory opinion. But he is unquestionably applying a policy, which may be his own or that which lies behind the legislation. Thus, in a judicial decision, as in an administrative decision in an individual case, there are three possible elements; (a) the facts, (b) the rules of law, and (c) the policy which the law is intended to further. 'Where the whole question is (a), it is commonly left to a court unless the subject is so technical that the elucidation of the facts is best left to an expert. Where the emphasis is upon (c), the question is commonly left to be settled by an administrator. Where there is doubt as to (b), then the court or the administrator will also have to consider (c).'<sup>4</sup>

The truth of the matter appears to be that the committee lacked the frankness or the insight to admit that the exercise of true judicial powers frequently permits a substantial degree of discretion, in which considerations of policy often enter. For them, any admixture of 'policy' in the virgin purity of a judicial determination immediately reduces it to the ranks of a quasi-judicial decision.<sup>5</sup> Sir Cecil Carr, lecturing to an American audience in 1941, reminded his listeners that the material for an investigation into quasi-judicial activities is more abundant on their side of the Atlantic than in this

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> An article by D. M. Gordon, K.C., entitled 'Administrative Tribunals and the Courts' in 49 *Law Quarterly Review*, p. 95, criticises the terminology of the Committee on Ministers' Powers, but Mr. Gordon's own terms are equally open to objection, *see* pp. 95-96, 106, 110.



country. 'If', he said wistfully, 'it be there found possible to disentangle the judicial from the administrative element in governmental agencies and to keep law and policy apart, we shall be watching with interest from Britain.'<sup>6</sup> We shall indeed.

When we turn to the practical recommendations of the Report, we find that the dubious distinction between judicial and quasi-judicial decisions enables the committee to escape from the fetters imposed upon it by its terms of reference.

The committee advises that if a statute is in general concerned with administration, its execution should be entrusted to an executive department; but if the measure is one in which 'justiciable issues' will be raised in the course of carrying it into effect, and 'truly judicial determination will be needed in order to reach decisions' then that part of the task should be separated from the rest and reserved for decision by a court of law, whether ordinary or specialised, as Parliament may think fit. It is only on special grounds that judicial functions should be assigned by Parliament to Ministers or ministerial tribunals.<sup>7</sup>

Quasi-judicial decisions stand on a different footing. Here the presumption as to the correct legislative course is, in the committee's view, the other way, for a decision which ultimately turns on administrative policy should normally be taken by the executive Minister.

Where exceptional circumstances justify the allocation of purely judicial decisions to executive bodies, the committee urge that a Ministerial tribunal is preferable to a Minister for the exercise of such powers. They recognise that Ministerial tribunals have much to recommend them on grounds of cheapness, accessibility, freedom from technicalities and expedition. They possess the

<sup>6</sup> Sir Cecil Carr, *Concerning English Administrative Law*, p. 98

<sup>7</sup> Report, pp. 98, 96.

requisite expert knowledge of their subject and are better able than the courts of law to maintain uniformity of decision.<sup>8</sup>

By the simple device of declaring that 'true' judicial decisions must reside with the courts except in special circumstances, but that quasi-judicial decisions may be given to administrative tribunals, the committee in effect recommend that decisions which require consideration of social policy in the field of public administration shall, as hitherto, remain within the sphere of Ministerial action. In this way a false analysis is employed to distinguish the things which are Cæsar's from those which are not.

The result is not altogether unsatisfactory as a guide to action. But one can only deplore the fallacious reasoning by which this incidental benefit was attained. In the long run, confused thinking and adherence to outworn doctrines cannot have good results; and the development of our public law is likely to be impeded, rather than assisted, by the introduction of untenable distinctions between judicial and quasi-judicial decisions, between law and policy, between 'justiciable' and 'administrative' questions.

#### THE SAFEGUARDS OF JUSTICE

The committee recommend a series of precautions which should be taken where judicial or quasi-judicial functions are exercised by Ministers, or other judicial functions by Ministerial tribunals,<sup>9</sup> to safeguard 'the rule of law'.<sup>1</sup> These comprise the right of the High Court to prevent a Minister or Ministerial tribunal from exceeding its statutory powers; the right of any party aggrieved by a judicial decision to appeal to the High Court on a question of law within a short specified period; the obligation of

<sup>8</sup> Page 97.

<sup>9</sup> This expression 'Ministerial Tribunals' is used by the Committee. In my view it is a misleading and inaccurate term.

<sup>1</sup> Pages 80, 98.

Ministers and Ministerial tribunals to observe the principles of natural justice which decree that a man may not be judge in his own cause, that no party ought to be condemned unheard, that each disputant must know in good time the case which he has to meet, and that the parties are entitled to know the reasons for the decision.<sup>2</sup>

A possible fourth principle of natural justice which the committee discussed at some length is the right of the parties to see the inspector's report upon a public inquiry into the subject-matter of a dispute, where this forms part of the procedure laid down by legislation. Such an inquiry is presumably intended to amount to an oral hearing, for it is the occasion on which the main facts are ascertained and the contentions of the parties put forward. The inspector who conducts the inquiry does not decide the case; he merely reports to the Minister. But his report may well form the basis of the departmental decision and hence it had been represented to the committee that natural justice demands that it shall be communicated to the parties.

Much criticism had been made by witnesses concerning the practice of treating reports on public inquiries as confidential documents for departmental use only. The committee set out at unusual length the arguments in favour of and against the existing practice; and expressed the opinion that on balance the right course is to publish the inspector's report together with the Minister's decision.<sup>3</sup> The committee did not, however, go so far as to identify this requirement with the dictates of natural justice.

The committee's insistence on the desirability of giving reasoned decisions was a more important departure from

<sup>2</sup> Pages 80, 98.

<sup>3</sup> Pages 80, 100-107.

established practice than publication of the inspector's report. I had myself strongly urged the committee to adopt this principle and had withstood a heavy barrage of objections raised by Sir John Anderson in his examination of me.<sup>4</sup> The report concedes the case for giving reasoned decisions in generous terms. 'It recommends that any party affected by a decision should be informed of the reasons on which it is based, and that the fullest amount of information compatible with the public interest should be given. The decision itself should be in the form of a reasoned document which should state the findings of fact and conclusions on any points of law which have emerged. Where a public inquiry has been held, and the Minister rejects the inspector's findings of fact or does not accept his recommendations in whole or in part, the reasons for this divergence should be given. Where the Minister's decision is based solely on grounds of public policy, his obligation is limited to a statement to that effect and it is not incumbent on him to embark on a lengthy exposition for the reasons underlying his policy.'<sup>5</sup>

The methods of the courts for dealing with the judicial review of administrative activities did not emerge unscathed from the investigation. The committee criticised the procedure by way of the ancient writs of certiorari, prohibition and mandamus as archaic, cumbrous and inelastic; and they recommended the introduction of a simpler, cheaper and quicker procedure: in short, of one more suited to modern needs.<sup>6</sup> The report was, nevertheless, exceedingly superficial on the subject of judicial review and touched very lightly, if at all, on the main problems arising in this sphere. The lawyers on

<sup>4</sup> Minutes of Evidence, Vol. 2, pp. 86-87, Qs. 1204-1220.

<sup>5</sup> Report, p. 100.

<sup>6</sup> Pages 62, 99. The ancient writs were abolished by legislation in 1938 and replaced by a system of Orders. See Administration of Justice (Miscellaneous Provisions) Act, 1938. Also Rules of the Supreme Court, Order 50, rr 8-10

the committee were, presumably, too loyal to their profession to disclose legal weaknesses in this respect to their colleagues; and the laymen had insufficient knowledge of the technique of the law to express an informed view on the subject.

In general, however, the report is relatively strong on the procedural aspects of adjudication. Its outlook is usually broad and sane, whether it is dealing with courts of law or administrative tribunals. It is in connection with constitutional structure and administrative organisation that the report displays a fundamental weakness.

#### ADMINISTRATIVE LAW DISAVOWED

We have already noted that the committee expressed a preference for powers being conferred on what they termed Ministerial tribunals, rather than on Ministers, where Parliament is satisfied that judicial issues of a particular class arising out of the administrative work of a department are not suitable for decision by the ordinary court. In such circumstances, if there is likely to be a regular flow of questions for adjudication, the report advises Parliament to set up a permanent specialised tribunal to deal with them. The decisions of a tribunal of this kind, whether permanent or ad hoc, should be independent of the Minister, but he might continue to appoint its members in accordance with the existing practice.<sup>7</sup> In the more important appointments the Lord Chancellor might be consulted, though the appropriate Minister would remain responsible.

Furthermore, while there would normally be no appeal to any court of law from either a Minister or a Ministerial tribunal on an issue of fact, the committee saw no objection to such an appeal lying to a specially constituted appeal tribunal, at any rate in exceptional circumstances.

<sup>7</sup> Page 109.

This would be appointed either by a Minister with the concurrence of the Lord Chancellor or by the latter. It would consist of three persons, of whom only the chairman would be a barrister or solicitor. If appropriate personnel were selected, this body could become an administrative court of appeal on specified questions of fact (whatever that may mean!). It would, in theory, have no jurisdiction on points of law, which would be reserved to the ordinary courts; nor would it be concerned with quasi-judicial decisions, since the committee expressly declares itself to be 'definitely opposed to any right of appeal from an administrative decision, whether it contains a judicial element or not'.<sup>8</sup>

Having thus sanctioned the exercise of quasi-judicial powers by 'Ministers of Ministerial tribunals' as the proper course of affairs; having admitted the need on occasion for 'true judicial decisions' being entrusted to these administrative tribunals; having proposed the establishment of a superior administrative tribunal to hear appeals on issues of fact; having expressed a preference for independent 'Ministerial tribunals' exercising a specialised jurisdiction connected with the administrative work of particular departments and appointed by the appropriate Minister; having swallowed all this, the committee solemnly recorded its sense of the '*Inexpediency of establishing a system of administrative law*' in the following passage<sup>9</sup>:—

Mr. W. A. Robson has put before us detailed proposals for the establishment of a system of administrative Courts and administrative Law independent of Ministers as the best remedy for the defects of the existing system to which our terms of reference are directed. We have considered their expediency, but

<sup>8</sup> Pages 108-109.

<sup>9</sup> Page 110.

interesting as they are, we cannot recommend their adoption; in our view they are inconsistent with the sovereignty of Parliament and the supremacy of the Law.

Under the existing system Ministers are subject in the exercise of judicial and quasi-judicial functions to the supervisory jurisdiction, and we propose that in future in the exercise of their judicial functions they should also be subject to the appellate jurisdiction of the High Court; while on questions of policy a Minister in the exercise of his quasi-judicial functions will remain subject to control by Parliament and to the influence of public opinion with which he is in daily contact and to which he is highly sensitive.

A regularised system of administrative Courts and administrative Law, such as Mr. Robson proposes, would involve the abolition of both the supervisory and the appellate jurisdiction of the High Court in matters pertaining to administration; and we believe that it would result in the withdrawal to a great extent of those judicial activities, which are inseparable from administration, from the influence of public opinion. We, therefore, without hesitation advise against its adoption.

The Lord Chief Justice has himself expressed the opinion in chapter III of *The New Despotism* that 'droit administratif' is completely opposed to the first principles of our Constitution.

It has sometimes occurred to me that the committee may have inserted this formal rejection of my proposals with its tongue in its cheek, if a committee composed of such eminent men may be presumed to have any cheek. For the issue before the committee was not, by any stretch of imagination, the question of *establishing* a system of administrative law. There was already in existence a system of administrative law as large as life,

though one might perhaps have hesitated to use the word 'system' to describe the unco-ordinated and haphazard arrangements which the committee had surveyed.

The whole purpose of my proposals had, indeed, been to rationalise the methods of adjudication by administrative bodies, and to introduce, so far as possible, systematic institutional forms in this sphere of activity. But the suggestion which is implied by this part of the report that my proposals meant introducing a body of administrative law into the hitherto uncontaminated system of English law is entirely false.

#### THE ISSUES DEFINED

The essence of my proposals consisted of the following items, which I reproduce from the memorandum of evidence<sup>1</sup>:—

*Judicial powers should invariably be exercised by a definite tribunal consisting of public servants specially nominated for the purpose by the responsible Minister.*

*The representation of outside interests on the tribunal is desirable in certain circumstances.*

There were numerous examples of administrative tribunals of this kind already in existence, and the effect of my proposal would merely have been to generalise the method. The committee refer in their report to the Special Commissioners of Income Tax, an extreme example of an administrative tribunal since it consists of civil servants. This specialised court, they said, by common consent 'gives general satisfaction by its impartiality, in spite of the fact that its members are not only appointed by the Treasury, but may, when not performing judicial duties, actually act as administrative officials. All we can say about it is that it is a standing

<sup>1</sup> Evidence, Vol. 2, p. 53



tribute to the fairmindedness of the British Civil Service'.<sup>2</sup> They nevertheless thought that the precedent should not be followed in other branches of administration, though they did not explain their reasons for this view.

I was, however, in no sense wedded to the idea of an administrative tribunal consisting of officers serving in a department, and I should even have preferred tribunals of the type of the courts of referees for unemployment insurance. I had, indeed, expressly urged that the representation of outside interests on the tribunal is desirable in appropriate circumstances.<sup>3</sup> The committee themselves, as we have seen, came down heavily in favour of specialised tribunals, appointed by Ministers, for the exercise of judicial functions, rather than leaving such powers in the hands of Ministers. There was, therefore, little or no difference on this question between my proposals and the committee's recommendations except on the question of jurisdiction.

The committee, having become involved in the elaborate and, in my opinion, false distinction between judicial and quasi-judicial decisions, was unwilling to remove the latter type of case from the immediate control of a Minister. Hence, the Ministerial tribunals would deal only with 'true' judicial functions. I, on the contrary, consider that all the functions of administrative justice should be carried out by distinct tribunals rather than be left to be dealt with in an undifferentiated way by departments.

*The Ministerial control over the work of an administrative tribunal should be strictly confined to directions as to principles to be followed contained in a letter*

<sup>2</sup> Page 87.

<sup>3</sup> Minutes of Evidence, Vol. 2, p. 53, para. 7, item (13), and p. 63, Qs. 928-929. Even where officials were appointed I had said that 'whenever there was enough work to keep them occupied on judicial or quasi-judicial work, I would certainly prefer that they should be engaged on nothing else', p. 59, Q. 848.

*of reference addressed to the members. This document should invariably be open to the public.*

The effect of this suggestion would be to enable a Minister to maintain control over the general policy of a tribunal while leaving it free to decide individual cases as it thinks fit in the light of the principles which it would be required to apply. This is in fact the relationship which exists between the Minister of Health and district auditors; between the Minister of Transport and the Area Traffic Commissioners; between the Minister of Labour and National Service and the Military Hardship Committees; and in various other instances.<sup>4</sup>

The committee regarded the suggestion as inconsistent with the sovereignty of Parliament and as likely to result 'in the withdrawal to a great extent of those judicial activities, which are inseparable from administration, from the influence of public opinion'. This argument is very difficult to follow. If Parliament prefers a more independent type of administrative tribunal there is nothing inconsistent with its sovereignty in legislating to that effect. Indeed, it has done so to a marked extent in the years which have elapsed since the committee's report was published. Moreover, the committee had no evidence whatever to show that either Parliament or public opinion exercise any control or influence over Ministers in the performance of their judicial or quasi-judicial powers. Most departments carry on these activities in great obscurity and in an atmosphere of secrecy. Considerable doubt was expressed both by witnesses and members of the committee during the investigation whether a Minister can be questioned in Parliament about the exercise of his judicial powers.<sup>5</sup>

<sup>4</sup> See below, pp. 97, 184, 182-3.

<sup>5</sup> Minutes of Evidence, Vol. 2, p. 158, Q. 2920; p. 156, Qs. 2281-2282; p. 152, Qs. 2212-2215.

Lastly, there was the question of an appeal tribunal. I had proposed that :—

*In important questions an appeal should lie to a superior administrative appeal tribunal.*

This tribunal, which would possess the institutional features of a court, would have power to review the decisions of inferior administrative tribunals on all grounds, whether of fact, law or policy. The committee recommended that an administrative appeal tribunal might, in special circumstances, review questions of fact, but not other aspects of a decision. They urged that the supervisory jurisdiction of the High Court to compel Ministers and Ministerial tribunals to ‘hear and determine according to law’ should be maintained in respect both of their judicial and quasi-judicial powers. This involves requiring them to keep within their powers; to act in good faith and to exercise a judicial discretion.<sup>6</sup> Any party aggrieved by the judicial decision of a Minister or ministerial tribunal should have an absolute right of appeal to the High Court on any question of law. This would apparently not apply to a quasi-judicial decision.

I have defined as carefully as possible the basic difference between my proposals and the committee’s recommendations. They are far narrower than a casual reader might suspect from the deliberate disavowal of my suggestions given in the report on the exalted ground that they are ‘inconsistent with the sovereignty of Parliament and the supremacy of the law’.

#### DR. JENNINGS’ VIEWS

Dr. Jennings strongly criticises the committee’s attitude towards a system of administrative courts and the reasons on which it is based. ‘We can’, he writes, ‘establish administrative courts and alter the rules of administrative

<sup>6</sup> Report, p. 117, para. vii (a).

law as we please without infringing any rule of law. The fact that any proposal is rejected as contrary to the rule of law indicates that the arguments against it are probably weak.'<sup>7</sup>

Dr. Jennings dissents from the committee's refusal to recommend that an administrative court should be established. In his view, such a court should (1) hear complaints that an administrative authority is exceeding its powers; (2) decide cases where a person claims that, owing to a wrongful act committed by an administrative authority, he has suffered injury; (3) hear appeals on points of law wherever they are allowed.

These functions, he observes, are at present exercised by the High Court. No new administrative law would therefore be created, although a better procedure would be adopted. 'The "rule of law" simply has nothing whatever to do with the question. An administrative court would be just as much a part of the ordinary judicial system as the High Court. Administrative law would be neither more nor less a branch of the ordinary law than it is now. There would be just as much and just as little equality before the law as there is now. Dicey's views are not only wrong but irrelevant.'<sup>8</sup>

In Dr. Jennings' view, an administrative court is desirable for three reasons. First, the technicality of administrative questions calls for a judge familiar with the problems which administrative law is trying to solve. Second, the ordinary procedure of the High Court is not suited to the task of controlling administrative authorities. Third, new rules of interpretation and of liability ought to be developed in relation to the special problems of administrative law. He assumes that if an administrative judge is to develop this branch of the law effectively on

<sup>7</sup> W. Ivor Jennings, 'The Report on Ministers' Powers' in 10 *Public Administration*, p. 333.

<sup>8</sup> *Ibid.* pp. 348-349.

the basis of reforms by Act of Parliament, he must be removed from the influence of some of those common law traditions which grew up before the development of our modern system of administration. Hence the argument for separation. An administrative judge within the High Court is, in his view, an administrative court just as surely as an administrative judge outside. An administrative court would be expected to display the high traditions of independence and probity which distinguish the High Court.<sup>9</sup>

By way of illustration of his thesis that a new attitude is required, Dr. Jennings mentions the need to wipe out the present rules of judicial interpretation of statutory provisions. These are narrow and pedantic in the extreme, as Professor Laski cogently pointed out in his note to the committee's report.<sup>1</sup> Again, the conditions under which liability attaches to public authorities in respect of injury resulting from their activities also need changing. The committee had emphasised the need for passing the Crown Proceedings Bill to reform this branch of the law. 'If that Bill is ever passed', Dr. Jennings observed, 'it will need a liberal interpretation by a court which is not limited by the ancient boundaries of contract and tort, in order that the subject may be effectively protected against arbitrary administrative acts. . . . What it needs to do, that is to say, is to develop the law laid down by Parliament with something of the spirit of the *Conseil d'Etat*.'<sup>2</sup>

The committee had admitted that the French system gives protection to the citizen against arbitrary acts of the public service in a much higher degree than exists in England under the much-vaunted rule of law expounded by Dicey. They confessed with some embarrassment that

<sup>9</sup> *Ibid.* p. 351.

<sup>1</sup> Annex V.

<sup>2</sup> Jennings, *op. cit.*, p. 350.

foreign critics are justified in contending that under the English rule of law the subject's remedies against the executive are defective and substantially less than those which exist between private persons.<sup>3</sup> They even went outside their terms of reference to the extent of indicating the need for passing the Crown Proceedings Bill.

Dr. Jennings' approach to the question was broadly similar in tone and temper to my own. Our objectives were, in the main, identical. The only important difference was that he conceived an administrative court as lying within and forming part of the High Court, whereas I contemplated a separate institution. I greatly doubt if such a court as he advocates would possess the degree of freedom from common law traditions and procedure which we agree to be necessary; but if it did, I should welcome it. My doubts, however, have been increased by the views recently expressed by Dr. C. K. Allen, to which we may now turn.

#### DR. ALLEN'S VIEWS

Dr. Allen represents, in a more refined and scholarly manner, the school of thought of which Lord Hewart was the crudest and most indiscriminating exponent. His earlier views<sup>4</sup> have found fuller and more mature expression in his recent work, *Law and Orders*.<sup>5</sup>

Dr. Allen accepts the distinctions made by the committee between administrative, judicial and quasi-judicial decisions as a practical working guide, although not entirely satisfactory from a scientific standpoint.<sup>6</sup> The exact determination of what is truly judicial and what is purely administrative in the exercise of discretion is, he says, a constant problem of law.<sup>7</sup> He refers frequently,

<sup>3</sup> Report, p. 112.

<sup>4</sup> Expressed in *Bureaucracy Triumphant*.

<sup>5</sup> Stevens & Sons (1945).

<sup>6</sup> *Law and Orders*, p. 73.

<sup>7</sup> *Ibid.* p. 70.

not only to quasi-judicial decisions, but also to the 'quasi-judge' and to 'administrative quasi-law', which he identifies with what Lord Hewart called 'administrative lawlessness'.<sup>8</sup>

Dr. Allen classifies the judicial functions of administrative organs under (1) original powers exercised by Ministers; (2) appellate powers of Ministers; (3) appellate powers of Ministerial Tribunals; (4) judicial and quasi-judicial powers of special officers, such as the Chief Registrar of Friendly Societies and the Comptroller General of Patents; (5) other tribunals, not operating within or in direct association with Government departments. These include the Railway Rates Tribunal, the Industrial Court, the Commissioners of Income Tax, the London Building Tribunal and various domestic tribunals. Some of these tribunals, he states, 'have such a well-defined technical jurisdiction that they are, for all common purposes, administrative Courts, though there is a great reluctance among English lawyers to admit that that kind of "Court" is known within our legal system'.<sup>9</sup> Dr. Allen's classification is open to criticism in several respects. For example, it makes no provision for the exercise by 'Ministerial Tribunals' of original powers. Nor is it clear why the Road and Rail Traffic Appeal Tribunal is termed a 'Ministerial Tribunal' while the Income Tax Commissioners come under the heading of 'other tribunals'. I do not wish, however, to pursue this aspect of his work, since no question of principle hangs on it.

What is important is that Dr. Allen frankly admits that we have an extensive body of administrative law and a series of administrative courts. He rightly says that 'our whole body of administrative law is, to say the

<sup>8</sup> *Ibid.* p. 155.

<sup>9</sup> *Ibid.* p. 81.

least, a labyrinth', if not a wilderness in which it is only too easy to lose the way.<sup>1</sup>

The individual citizen, seeking to assert his rights in some field of administrative action, is confronted by a bewildering diversity of tribunals, of procedures and of rules. 'Sometimes he may take his complaint to the courts, or to a particular court or succession of courts, at one time by ordinary legal process, at another time by special procedure. Sometimes he may appeal to a Minister or a board or a committee, sometimes to a special tribunal operating either inside the department or outside it, in which case he sometimes has further appeal and sometimes not. It may be, again, that he has to go to an independent quasi-judicial officer or to a High Court judge entrusted with a special jurisdiction. And sometimes he has no recourse at all, unless his common law right to petition Parliament, or his hope of inducing his Member to make a fuss, can be called an "appeal"'. Everywhere there is apparent a very high degree of British empiricism, and it is evident that, with the multiplication of new needs and methods, the whole system has grown up at haphazard. Now, none of this distracting diversity would be possible in France, where there is a well-defined and efficient system of adjudication, which forms a separate jurisdiction, with machinery of its own, for disputes between the citizen and the State. Nor is the same confusion possible, in the same degree, in the United States, where again special courts have jurisdiction over a great variety of administrative matters, and where "administrative law" is recognised as a branch of legal science and does not bring to the cheeks of jurists that blush of shame which Professor Dicey seems to have painted indelibly on the countenances of English lawyers. It is quite absurd to pretend that we have no administrative law in this

<sup>1</sup> *Ibid.* p. 163.



country, though of course we have none of that superseded Napoleonic *droit administratif* which anciently gave privilege to public functionaries merely because they were servants of the State.'<sup>2</sup> It would, indeed, be as untrue to say that we have no administrative law as to say that we have no constitutional law.

The irresistible inference from this passage is that the present state of affairs in England is profoundly unsatisfactory, and that the rationalisation of our administrative law and the systematisation of our administrative tribunals and the courts dealing with this branch of law are urgently needed. But Dr. Allen is unable to face up to the implications of his own indictment.

He regards the proposals which I put before the Committee on Ministers' Powers as not unattractive, in view of the existing chaos; and he acutely observes that the committee failed to appreciate that the procedure of the Administrative Appeal Court which I advocated would be essentially judicial. 'He cannot, however, stomach the idea of an administrative tribunal being concerned with the promotion of governmental ends.' The notion that such a tribunal should be conscious of the functions and duties of government is for him the very antithesis of justice.

Dr. Allen disagrees with my suggestion that an opposition exists in England between the ideas of 'law' and of 'government'.<sup>3</sup> There is, he declares, no such opposition, for the judge is not concerned at all with government; he is concerned only with the administration of justice. My proposals would produce, in his opinion, not a judicial tribunal, but an instrument of policy, 'a piece of administration in judicial guise', dependent upon the policy of the Government of the day.<sup>4</sup>

In any event, Dr. Allen concludes, it is not at present

<sup>2</sup> *Ibid.*, pp. 163-4.

<sup>3</sup> Minutes of Evidence, Vol. 2, p. 52, para. 2.

<sup>4</sup> *Law and Orders*, pp. 170-1.

necessary or practicable to create artificially a distinct and separate jurisdiction, like that of the *Conseil d'Etat*. 'If pressure of work and multiplication of administrative appeals ever made such a tribunal desirable'—the conditional form of this statement deserves note—'there would be no harm in it, provided that it remained a legal Court of Appeal, like any other court.' It would amount to no more than a division of the High Court to which a special class of business had been assigned. It would be wholly independent and in no way subserving governmental ends.<sup>5</sup>

It is obvious that Dr. Allen brings a private law outlook to the solution of public law questions. He does not explain the nature of that justice, the administration of which is completely removed from governmental activities. It certainly cannot be connected with housing, or town planning, or public health, or social insurance, or education, or any of the other multifarious activities of the modern State.<sup>6</sup> Nor, in his eagerness to denounce my proposal for administrative tribunals which would pay some regard to governmental ends, does he stop to consider the alternative. At present, far too many judicial powers are conferred directly on Ministers, with the result that they are subject to direct executive control. My aim throughout has been to transfer these powers to tribunals which would be independent of Ministerial control, except in so far as this enunciated the general principles which the tribunal should follow. These principles would be laid down in a letter of reference or regulations which would be open to the public, in much the same way, for example, as the Minister of Health gives general directions to the Local Government Boundary

<sup>5</sup> *Ibid.*, pp. 171-2.

<sup>6</sup> Cf. W. I. Jennings, 'Courts and Administrative Law—The Experience of English Housing Legislation' in 49 *Harvard Law Review*, 426.

Commission, leaving the commission free to apply them as they think fit.

I am not unduly disturbed at Dr. Allen's fulmination against my appeal tribunal as being 'a piece of administration in judicial guise'. All courts of law are pieces of administration in judicial guise.

Despite fundamental differences in our views concerning the judicial process, public administration, the nature of law, the proper objectives of government and various other topics, I doubt if the purposes at which Dr. Allen aims in regard to administrative justice differ widely from those pursued by the writer or by Dr. Jennings. We all, it would seem, desire to see the present chaotic arrangements replaced by others which would more effectively safeguard individual rights without unduly hampering the executive organs in the performance of the tasks which Parliament has imposed upon them. We all desire to provide a more comprehensive system of remedies against public authorities and more efficient methods of judicial review of administrative action.

Whatever criticism may be made of Dr. Allen's doctrines, which sometimes spring from the heart rather than the head, of his impassioned eloquence and fiery denunciations of the executive,<sup>7</sup> his concrete proposals are

<sup>7</sup> Dr. Allen's sallies at 'Departmental understrappers' sometimes remind me of the verses entitled 'Red Tape Worm' by Edward Forbes the naturalist (1815-1854):—

In Downing Street the tape worms thrive  
In Somerset House they are all alive;  
And slimy tracks mark where they crawl  
In and out along Whitehall.

When I'm dead and yield my ghost  
Mark not my grave by a Government post;  
Let mild earth worms with me play,  
But keep vile tape worms far away.

And if I deserve to rise  
To a good place in Paradise  
May my soul kind angels guide  
And keep it away from the official side!

not very far removed from those advanced by the present writer or Dr. Jennings.

In the first place, he evinces no desire to abolish administrative tribunals. Indeed, he concedes that in a great many matters tribunals of this kind may perform their tasks as well as the courts and probably better. Far from wishing to transfer their functions to the High Court or the courts of summary jurisdiction, which are already overburdened, he is in favour of setting up additional special tribunals to deal with workmen's compensation and revenue matters.<sup>8</sup>

Secondly, the Administrative Appeal Court which he adumbrates so cautiously—'if pressure of work and multiplication of administrative appeals ever made such a tribunal desirable'—would resemble, in form at least, the Administrative Court proposed by Dr. Jennings. In substance the two conceptions may be farther apart, for Dr. Allen thinks that the judiciary has nothing to learn in the business of adjusting wisely and well the relations between the individual and public authorities, while Dr. Jennings thinks that a radical break with the common law tradition is required.

#### CONCLUSION

So much, then, for this inquiry. In the foregoing pages I have given a short outline of the background to the appointment of the Committee on Ministers' Powers and its terms of reference; an analysis of the more important aspects of the evidence, and a critical exposition of the principal features of the report. I have expressed my own views on the report, and I have also given those of Dr. Jennings and Dr. Allen on some of the main questions with which it deals.

The committee undoubtedly served a valuable purpose in exploding the theory, assiduously cultivated by Lord

<sup>8</sup> *Law and Orders*, pp. 168-169.

Hewart and others, that there was a great conspiracy afoot in the Civil Service to deprive Parliament and the courts of their rightful powers in order that officials might indulge in an orgy of administrative lawlessness masquerading under a cloak of false legality.

The committee were completely impervious to sensational absurdities of this kind. They invited the Lord Chief Justice to give evidence and justify his charges, but he refused to do so. They put on record their considered view that there is no ground for a belief that our constitutional machinery is developing in directions which are fundamentally wrong, and no reason for any lowering of the high esteem in which the Civil Service is held.<sup>9</sup> They declared explicitly that in the exercise by Ministers of their judicial and quasi-judicial powers justice is as a general rule substantially done.<sup>1</sup> They put modern constitutional developments in their proper historical setting.

All this was very much to the good. The general temper of the report was sane and balanced. This, indeed, was one of its chief merits, which did much to reassure public opinion. Ghosts were laid which have not subsequently stalked the corridors of even the most orthodox constitutional lawyers. The cloak and dagger view of bureaucratic conspiracy faded quietly away.

In regard to the exercise of judicial functions, the committee showed much common sense and breadth of outlook on procedural questions, such as the desirability of giving reasoned decisions, the need for publishing reports and so forth. It is on matters of structure and organisation that the report is weak and timid.

Having become bogged in an impossible attempt to distinguish judicial from quasi-judicial decisions, the committee never subsequently recovered its full freedom

<sup>9</sup> Report, p. 7.

<sup>1</sup> *Ibid.* p. 6.

of action to deal with the various types of tribunal on a sound basis of function and purpose. It was thus driven to recommend that 'true judicial functions' should normally go to the courts; that where for exceptional reasons the courts are not suitable for such functions, they should be entrusted to ministerial tribunals; and that quasi-judicial powers should be exercised by Ministers simpliciter. The report makes no provision for an administrative court, but relies on the supervisory jurisdiction of the High Court, the rules of natural justice and a right of appeal on points of law from a judicial decision. It makes no recommendations as to the most appropriate organisation by government departments for the task of adjudication.

The committee thereby lost a great opportunity for making a constructive contribution to the reform of administrative justice. This was partly due to the fetters placed upon it by its terms of reference. But we can at least say that the report did not actively impede the expansion of administrative adjudication, since the alleged distinction between judicial and quasi-judicial decisions is so dubious and unreal that it cannot be applied in practice.

Since the committee's report was published in 1932 there has been a formidable development of administrative justice. Among the more notable features of its growth are the new judicial powers of the Ministry of Town and Country Planning; the extended jurisdiction of the Minister of Transport and the Traffic Commissioners; the appointment of the Road and Rail Traffic Appeal Court; the creation of numerous tribunals connected with the work of the Ministry of Labour and National Service, such as the military hardship committees, local appeal boards and reinstatement committees; the transfer of workmen's compensation claims from the courts to administrative tribunals to be established for industrial

injuries; the widening in the general scope of the work falling to the pension and insurance tribunals; the establishment of tribunals to deal with independent schools, medical practitioners participating in the National Health service, and the rent of furnished dwellings. The stream is a swelling one.

In the legislation which has been passed during the last fifteen years one can discern no attempt to apply the distinction drawn by the committee between judicial and quasi-judicial decisions as a basis for allocating functions to the courts or to administrative tribunals. In introducing Bills Ministers have not asked Parliament to consider whether the determination of a particular class of question involved 'law' or 'policy' or other fine-spun distinctions of that kind. Parliament has proceeded to legislate on the safer and more robust ground of considering whether the task of adjudication could be carried out more effectively by the courts of law or by an administrative tribunal. The criteria which have been adopted, consciously or unconsciously, appear to be those suggested in this book<sup>2</sup> and which I put forward in evidence before the Committee on Ministers' Powers.<sup>3</sup>

We may now consider the developments which have taken place in the courts of law since the committee's report appeared. By so doing we shall see the effect of the report on the attitude of the judicature towards administrative tribunals and the executive generally.

<sup>2</sup> *Post*, Chapter 8.

<sup>3</sup> *Evidence*, Vol. 2, p. 53, para 7.

## CHAPTER 7

### THE ATTITUDE OF THE JUDICATURE

Judicial Indulgence—The *Arlidge Case*—The Minister and his Jurisdiction—The *Davis* and *Yaffe Cases*—Clearance Orders in the Courts—The Minister's Advisory Powers—Inspector's Report—The Cult of the *Quasi*—Procedure of Administrative Tribunals—Judicial Review Considered—The Law Officers and Patent Appeals—The Sargent Committee—The Business of the Courts Committee—The Swan Committee—'According to the Evidence'—Conclusion.

#### JUDICIAL INDULGENCE

IN the preceding pages I have made a somewhat detailed but by no means exhaustive survey of the judicial functions which modern legislation has placed in the hands of departments of the central government, or of administrative tribunals working in conjunction with, and usually controlled to a greater or lesser extent by, those departments. I now propose to describe the views, as expressed in judicial decisions, which have been taken by the highest courts of the country of the way in which the administrative departments of State and local authorities may or should carry out their judicial functions.

One of the earliest cases came before the courts four or five years after the passing of the Public Health Act, 1875. This arose out of an appeal to the Local Government Board under section 268 of that Act (which has been given in full on pp. 108-9) by a landlord who had been required by a local authority to pave a street on which his premises were fronting, and who had then been charged with the expense incurred by the local authority when acting subsequently in his default. Brett, L.J., remarked that whereas the decisions of the local authority in the matter were clearly not to be considered judicial, he was strongly of the opinion that the decision of the Local



Government Board certainly was judicial; and that it was the duty of the board to hear the parties presenting the memorial containing the grounds of appeal.<sup>1</sup> A few years later, in 1886, Mr. Justice Mathew, in language which was obviously hostile to the same department, made it clear that he refused to regard the powers of the department as usurping or excluding the jurisdiction of the court, unless the aggrieved person himself chose to resort to Whitehall and thereby submit to the verdict of the department. 'I should have thought', said the learned judge, 'that there was much weight in the argument that the Local Government Board could not be treated (under section 268) as a court having exclusive jurisdiction in a case of this kind. It may be that if a party chooses to resort to that tribunal, he should be bound by what it does. But that it should otherwise be conclusive is opposed to all principle. It is not a court. No procedure is pointed out, and the idea is that the board are to pronounce what judgment they choose, though opposed to law and principles of equity, so long as they think it equity.'<sup>2</sup>

Although there was a vast expansion of activity in just those fields of public administration where the great departments of State were empowered to exercise judicial functions, no striking change in the attitude of the judges towards these constitutional phenomena took place for a whole quarter of a century. But in 1911 and 1915 there came before the House of Lords two cases which may be regarded as landmarks for the student of law and government in England.

In the *Board of Education v. Rice and Others*<sup>3</sup> the matters in issue concerned the jurisdiction of the board to determine a question regarding the discrimination by

<sup>1</sup> *The Queen v. L.G.B.* (1882), 10 Q.B.D. 309.

<sup>2</sup> *Eccles v. Wirral Rural Sanitary Authority* (1886), 17 Q.B.D. 107.

<sup>3</sup> [1911] A.C. 179.

a local education authority against a non-provided school in the matter of salaries and the enforcement by the board of their decision. The immediate circumstances of the case are of no great importance. Lord Loreburn, the Lord Chancellor, pointed out in his speech in the House of Lords that recent statutes had imposed upon departments and officers of State the duty of deciding questions of various kinds. 'In the present instance', he continues, 'as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matters of law as well as matters of fact, or even depend upon matters of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to two sides, for that is a duty lying upon anyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial.' The board has no power to administer oaths, the Lord Chancellor added, and need not examine witnesses. They can obtain information in any way they think fit, so long as the parties are given an opportunity to correct or contradict statements likely to prejudice their case. Provided that were done, no appeal would lie to the courts. The board had no jurisdiction to decide abstract questions of law, but only determines actual differences as they arise. 'The board', he concluded, 'is in the nature of an arbitral tribunal, and a court of law has no jurisdiction to hear appeals from its determination either upon law or upon fact' unless they do not act judicially in the way mentioned.

The late Professor Dicey thought that the *Board of Education v. Rice* was important because it established the principle that power conferred by Act of Parliament upon a Government department must be exercised strictly

in accordance with the terms of the statute, or would otherwise be treated by the courts as invalid<sup>4</sup>; but its real significance seems to me to lie in the conscious recognition given by the highest court in the land to the comprehensive and exclusive character of the judicial functions exercised by the Board of Education. For the first time it was admitted that an administrative department of the Government had power to determine, finally and absolutely, not mere matters of fact, but also questions of law. If much of the law in the past had been made by judges, some of it at least would in the future be made by administrative officials.

#### THE ARLIDGE CASE

Of still greater importance was the case of the *Local Government Board v. Arlidge*,<sup>5</sup> which came before the House of Lords in 1915. In this case the Hampstead Borough Council had made a closing order in respect of a house in their district which appeared unfit for human habitation, and Mr. Arlidge, the owner, had appealed to the Local Government Board in accordance with the procedure prescribed under section 268 of the Public Health Act, 1875.<sup>6</sup> The Minister, after holding a public local inquiry, dismissed the appeal, and Mr. Arlidge then applied to the courts to declare the decision of the Minister to be invalid, mainly on the grounds that the order in which it was embodied did not disclose which of the officials in the Ministry actually decided the appeal; that he, the plaintiff, did not have an opportunity of being heard orally by that official, whosoever he may have been; and that he was not permitted to see the report of the inspector who conducted the local public inquiry on

<sup>4</sup> A. V. Dicey, 'The Development of Administrative Law in England', 31 *Law Quarterly Review*, 148.

<sup>5</sup> [1915] A.C. 120.

<sup>6</sup> See pp. 107-110.

behalf of the Minister. The Court of Appeal held by a majority that it was contrary to natural justice for the Minister to dismiss the appeal without disclosing to the appellant the contents of the inspector's report, and without giving him a chance of being heard; and they therefore allowed the appeal.<sup>7</sup> But the House of Lords held that he had no right to object to the Minister's order on these grounds.

Lord Haldane, then Lord Chancellor, remarked in the course of his speech that when the duty of deciding an appeal was imposed 'those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice'. But, he continued, the procedure of every tribunal need not follow the same lines. It may vary according to the nature of the tribunal, although tradition has in this country prescribed certain principles for a court of law to which in the main the procedure must conform. It has become increasingly common, he pointed out, for Parliament to give an appeal 'in matters which really pertain to administration, rather than to the exercise of the functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial'. When Parliament entrusts a department, such as the Local Government Board, with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow its own particular methods of procedure, which is necessary if it is to do its work efficiently. In a great department like the Local Government Board the Minister at the head is directly responsible

<sup>7</sup> *R. v. Local Government Board*, [1914] 1 K.B. 160.

to Parliament for everything that is done in his department. A huge volume of work is entrusted to him, most of which he cannot do himself. 'He is expected to obtain his material vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. . . . Unlike a judge in a court, he is not only at liberty, but is compelled to rely on the assistance of his staff. When, therefore, the department is directed to dispose of an appeal, that does not mean that any particular official of the Ministry is to dispose of it.' Provided that the work is carried out fairly and judicially in the sense indicated by Lord Loreburn in the *Board of Education v. Rice*, no other body save Parliament can review what has been done by the Minister who is responsible. Finally, Lord Haldane expressed the view that the board was not bound to hear the appellant orally, provided he had had the opportunity (which was, in fact, provided) of stating his case. There was, he added, no *lis inter partes* in matters of this kind.<sup>8</sup>

Lord Moulton took up in effect a similar point of view. After describing the way in which the old method of summoning a householder before the justices of the peace had been superseded by a system which gave much wider authority to the local council, and which substituted an appeal to the central department in place of that to quarter sessions, the learned law lord said he had no doubt 'that the new procedure was intended to be an appeal to a superior executive body as such, and that it was not intended that the Local Government Board should act in a purely judicial capacity'. Nevertheless, he added, it must act 'in a judicial temper', and must treat the matter 'in a judicial spirit, availing itself of its wide powers solely for the purpose of carrying into effect in the

<sup>8</sup> *Local Government Board v. Arlidge*, [1915] A.C. 120.

best way the provisions of the Act'. Its procedure need not be that of a court of law.

Lord Shaw of Dunfermline concurred generally with the views expressed by the Lord Chancellor, and paid particular attention to the plea put forward on behalf of Mr. Arlidge that he was entitled to get behind the formal pronouncement of the Board—that is, the order confirming the closing order and the dismissal of the appeal against it—and 'to ascertain which, in this great department of State, were the actual minds or mind which judged his case'. This claim, which Lord Shaw referred to as 'a grotesque demand to individualise the department for private purposes', was, he held, unjustifiable. The reasons he gave for dismissing the argument were that 'it is not supported by statute, it would be inconsistent with past administrative practice, and it would not tend to, but might seriously impair, administrative efficiency'. On nearly similar grounds Lord Shaw rejected the respondent's claim that he was entitled to an audience of the particular judge, or judges, of his appeal, when these had been identified, in order that he might have a personal hearing which should survey the whole of the material available, and disclose the report made on the public local inquiry and the views put forward thereon, by the inspector who conducted it, for the guidance or consideration of the department. If such a disclosure were compulsory, said Lord Shaw, it would place a serious impediment upon 'that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks'. The same argument would lead to a disclosure of the whole file containing the views of the entire hierarchy of inspectors, secretaries, assistants, consultants and other officials 'who had considered the matter, many of whose opinions may differ, but all of which form the material for the ultimate decision'. To reveal the process by which this corporate

opinion was gradually evolved in the department would, he thought, be not only inconsistent with efficiency and existing practice, but also with the theory of Parliamentary responsibility for departmental action.

What clearly emerged from the decision of the House of Lords in the *Arlidge Case* is that a Government department entrusted by an Act of Parliament with the exercise of judicial functions need not follow the methods adopted by the courts, but may employ any rules which appear fair and convenient for the transaction of business.<sup>9</sup> Thus, an administrative tribunal need not furnish an appellant with the reasons for its decisions, but may merely announce the conclusion, whereas it is the strictly followed custom, in the superior courts of justice at any rate, to explain at length the reasons which have led the judge to form his decision. Nor need particulars be furnished of the evidence on which the conclusions of the department are based. Again, the decision of the government department exercising judicial functions need not be conclusive, as in the case of a court. The inquiry may be reopened at any time by the department and the decision revised.<sup>1</sup>

On the other hand, the complete immunity from legal liability which is enjoyed by ordinary judges when acting in their official capacity may not always be held to extend to those who are primarily administrators but nevertheless engaged in judicial functions.<sup>2</sup> Some limitation to the application of the broad principle of complete judicial immunity may in the view of the courts prove to be necessary. Also the rule that a fair opportunity be given to each party to present his case is one which will invariably be applied to every tribunal, no matter how

<sup>9</sup> A. V. Dicey, 'The Development of Administrative Law in England', 31 *Law Quarterly Review*, 148.

<sup>1</sup> *Parsons v. Lakenheath School Board* (1889), 58 L.J.Q.B. 371.

<sup>2</sup> *Everett v. Griffiths*, [1921] 1 A. C. 631, at p. 659.

wide its powers or how complete its discretion.<sup>3</sup> This may include a right of replying to statements made by an opposing party.<sup>4</sup>

Seldom have the provisions of an Act of Parliament involving issues of far-reaching constitutional importance been interpreted in a more generous and broad-minded spirit than that manifested by the House of Lords in the *Arlidge Case*, or with less regard to narrow-minded legal pedantry. For good or for evil, a Government department was from then onwards to be entitled to carry out its judicial functions in the most free and informal manner possible consistent with elementary ideas of justice, unfettered by conventional restrictions as to method and procedure. Henceforth, the government offices in Whitehall were, within their prescribed sphere, to take their place side by side with the courts of law not merely as fact-finding agencies but also as interpreters of the law; as wielders of final and absolute authority rather than as the producers of mere provisional conclusions subject to review in the royal courts of justice; as the possessors of methods of investigation and adjudication as valid within their own province as the processes which for centuries had been carried out by the judges in their courts.

No restriction was imposed save that attention should be paid to that curious entity known as 'natural justice'. It was said in one case that 'it is impossible to lay down the requirements of natural justice',<sup>5</sup> but the phrase is actually employed to denote two or three elementary principles which, according to English ideas, must be followed by all who discharge judicial functions. Thus, it is 'against natural justice' to arrive at a decision before both parties have had an opportunity of stating their case. No one must be condemned unheard. The

<sup>3</sup> *Board of Education v. Rice*, [1911] A.C. 175.

<sup>4</sup> *R. v. Housing Appeal Tribunal*, [1920] 3 K.B. 394.

<sup>5</sup> *R. v. L.G.B.* (1911), 2 I.R. 331.



word 'natural' can hardly be taken to mean primitive, or refer to characteristics found among savage tribes, for anything less 'natural' in that sense, or more peculiarly the product of a developed state of society, than the idea that a decision should be delayed until the person concerned has been given an opportunity of being heard, it would be impossible to discover.

The principles laid down by the law lords in the *Arlidge Case* have been applied to a much wider sphere than the judicial activities of the Minister of Health, or even of government departments generally, though it was with such bodies that the House of Lords was primarily concerned. Thus, the Judicial Committee of the Privy Council advised the Crown, employing the very terms used in the *Arlidge Case*, that the Lieutenant-Governor of a Canadian province, in issuing Crown grants of land upon 'reasonable proof' of certain facts, was performing a judicial function which required him to 'preserve a judicial temper'.<sup>6</sup> A similar conception was applied to so remote an authority as the Governor of Trinidad, when transferring 'on sufficient ground shown to his satisfaction' the indentures of immigrants from one employer to another.<sup>7</sup>

The same benevolent spirit which marked the *Arlidge Case* in the House of Lords was reflected in a case which came before the Court of Appeal four years later. By the Port of London Act, 1908, Parliament had constituted the Port of London Authority and entrusted it with operating, maintaining and developing the port and docks of London and all the accommodation and facilities required in connection therewith. The statute empowers the Authority to grant licences of various kinds, and provides that if the Port Authority refuses to grant a licence on reasonable terms, or revokes one already in

<sup>6</sup> *Wilson v. Esquimalt and Nanaimo Ry.*, [1922] 1 A.C. 202.

<sup>7</sup> *De Verteuil v. Knaggs*, [1918] A.C. 557.

existence, the applicant or licensee may appeal against the refusal or revocation to the Board of Trade, whose decisions shall be final and binding on the parties. Here the Port of London Authority had refused a licence to construct a deep water wharf, barge canal and quays for reasons which the applicants considered amounted to an improper exercise of its discretion and therefore to be bad in law. Instead of appealing to the Board of Trade they asked the High Court to issue a mandamus to the Port Authority ordering it to grant the licence. The Court of Appeal was unwilling to allow the Board of Trade to be side-tracked in this manner. The question in issue, said Bankes, L.J., is one of policy to be decided ultimately by the Board of Trade. 'It can hardly be said that an appeal to that department is not as convenient and beneficial a remedy as a mandamus to the port authority with an appeal from them to the department.' This was one valid reason for discharging the rule nisi for mandamus. Lord Justice Scrutton, whose later utterances were not marked by any undue tenderness for Government departments, concurred with the remark that 'on a matter of trade policy an appeal to a Government department charged with the trade of England is a very convenient remedy'.<sup>8</sup>

There were very few cases going to the High Court concerning the exercise of judicial powers by administrative tribunals after the decision of the House of Lords in the *Arlidge Case* until the 1930's, and of those which did find their way there none was of importance except *R. v. Port of London Authority*.

After the Lord Chief Justice (Lord Hewart) had hoisted his flag to the mast and the Committee on Ministers' Powers had issued its report a considerable

<sup>8</sup> *R. v. Port of London Authority, ex p. Kynoch, Ltd.*, [1919] 1 K.B., at pp. 186, 188. For further details of the case see *ante*, p. 298.

number of cases came before the High Court, mostly relating to the exercise by the Minister of Health of his housing functions in which several questions of great significance were decided.

#### THE MINISTER AND HIS JURISDICTION

We may first notice, however, a case which concerned the judicial powers of the Minister of Transport in hearing appeals from the decision of Area Traffic Commissioners relating to passenger road services.<sup>9</sup> The relevant subsection of the Road Traffic Act, 1930, enacts that on any such appeal the Minister shall have power to make such order as he thinks fit (including an order revoking a licence), and his order is binding on the Commissioners.<sup>1</sup>

The appellant company, Upminster Services, Ltd., had applied for licences to operate road services between Upminster and London. Opposition to the grant was shown by the L.M.S. Railway and Green Line Coaches on the ground that the services in question were unnecessary. The Commissioners granted the licences and the above-mentioned opponents appealed on the ground stated to the Minister of Transport, who ordered that 'The Commissioner shall revoke the said licence so soon as he is satisfied, after consultation with the Traffic Commissioners for the Eastern Area, that adequate provision has been made for road services between Upminster and London'.

Upminster Services, Ltd., appealed to the Court, which held the Minister's action to be *ultra vires*. If the appeal to the Minister had succeeded the only proper course for him to take was to revoke the licence; but his

<sup>9</sup> *E. v. Minister of Transport, ex p. Upminster Services, Ltd.*, [1934]

<sup>1</sup> K.B. 277.

<sup>1</sup> Sections 74, 81.

order showed that the service was, in fact, necessary until such time as other provision for road services had been made. Therefore, the appeals ought to have been dismissed. Instead, however, the Minister had given orders for the future revocation of the licence and a letter he had written showed that the reason for his action was that the service had been improperly operated. The Act confers no power on the Minister to make an order directing the Commissioners to revoke a licence, and the jurisdiction to revoke on the ground of improper operation is expressly vested in the Commissioners by the statute, which provides no appeal from their decisions in this respect. The power of the Commissioners to revoke, said Lord Russell of Killowen, is to be exercised by them on application made to them, and in accordance with their discretion after hearing the parties and considering the matter. 'It is difficult to understand how the Minister can have considered himself entitled to dictate to the Commissioners how they were to exercise this discretionary power which is vested in them by way of original jurisdiction.'

The Minister, said Lord Justice Romer, seeks to justify his action on the ground that section 81 (2) of the Act enabled him to make any order that he thought fit. 'I am not prepared to take this view of the subsection. Plainly some limit must be placed upon the generality of the words used. No one can suppose that the legislature intended to create a dictatorship in the person of the Minister of Transport, if and whenever an appeal happened to be brought before him under the section. It is equally incredible that the subsection should have been intended to give the Minister power to make any order he might think fit relating to road transport in general, or even road transport in the area affected by the matter brought before him on the appeal. The

subsection, after all, is not dealing with the powers of the Minister of Transport as such. It is dealing with his powers as an appeal tribunal exercising quasi-judicial functions and the orders he may make as such.' Hence, concluded the Lord Justice, the Minister's decision must be confined, as in the case of other judicial or quasi-judicial tribunals, to the questions brought before him on the appeal, and he must not travel outside them.<sup>2</sup>

The court's insistence that the legislation defines the Minister's jurisdiction and that he keep within it, is not only sound but inevitable if legislation of this type is to have any clear and precise meaning. It accords, moreover, with the refusal of the Minister of Transport who introduced the Road Traffic Act, 1930, to accept an amendment to the Bill which would have enabled the Minister to give the Commissioners instructions as to how they should deal with particular cases coming before them.<sup>3</sup>

#### THE DAVIS AND YAFFE CASES

The housing cases may, for our present purpose, begin with *R. v. Minister of Health, ex p. Davis*.<sup>4</sup> An improvement scheme had been made by the Derby Corporation under Part II of the Housing Act, 1925, containing a clause which permitted the local authority to clear the area and to sell, lease or otherwise dispose of the property as they thought fit. Application was made to the High Court to prohibit the Minister from considering the scheme on the ground that it was ultra vires the Act, since the council did not explain what they proposed to do with the land after they had acquired it. (Lord Hewart stated in the Divisional Court that he thought that if

<sup>2</sup> *Ibid.* p. 289.

<sup>3</sup> W. A. Robson, *Public Enterprise*, p. 362.

<sup>4</sup> [1929] 1 K.B. 619 (C. A.).

Parliament had really intended to confer such wide powers on the local authority it would have done so in explicit terms. The Court of Appeal took a similar view in holding the scheme invalid.<sup>5</sup> The Master of the Rolls stressed the importance to property owners, who are to be compulsorily expropriated, of being able to learn what is necessary for them to know in order to estimate the amount of compensation to which they are entitled and to decide whether or not to oppose the scheme at the local inquiry. This case, Dr. Jennings remarks, 'gave a slight bias against administrative authorities which became heavier in the subsequent cases'.<sup>6</sup>

Then came *Yaffe's Case*, which went to the House of Lords.<sup>6</sup> It also concerned a scheme containing similar powers made by the Liverpool Corporation under the Housing Act, 1925, but the Minister of Health had amended it to conform with the decision in *Davis's Case*. It was argued by the landowner that, as the scheme was initially ultra vires, it never was a scheme at all for the purposes of the Housing Act and hence could not be confirmed by the Minister. The Minister contended that as section 40 (5) of the Act provided that an order of the Minister when made 'shall have effect as if enacted in this Act' his order was excluded from judicial review. This view of the law was upheld by a majority (including Lord Hewart) in the Divisional Court but reversed in the Court of Appeal.<sup>7</sup>

The House of Lords decided that the words of section 40 did not preclude the courts from inquiring into the legality of a scheme. Lord Thankerton said 'The true principle of construction of such delegation by Parliament of its

<sup>5</sup> Courts and Administrative Law—The Experience of English Housing Legislation, 49 *Harvard Law Review* 445.

<sup>6</sup> *Minister of Health v. R. (on the prosecution of Yaffe)*, [1931] A.C. 494.

<sup>7</sup> [1930] 2 K.B. 98; [1930] 2 K.B. 133.

legislative function is that it confers only a limited power on the Minister, and that, unless Parliament expressly excludes the jurisdiction of the court, the court has the right and duty to decide whether the Minister has acted within the limits of his delegated power'.<sup>8</sup> A majority of the law lords held that the scheme as amended and approved by the Minister was legally valid.

Serious delay had been occasioned by this litigation. Many local authorities had adopted improvement schemes containing clauses similar to those which were declared illegal in *Davis's Case*. The Ministry of Health had endeavoured to keep within the law by modifying draft schemes still open to consideration, but a position of great uncertainty existed. In consequence, the law was changed by the Housing Act, 1930, which was passed before the House of Lords had given its decision in *Yaffe's Case*. The new statute widened the powers of local housing authorities so as to legalise schemes of the Derby type. The possibility of prolonged delay caused by litigation was eliminated by requiring a person aggrieved by an order to challenge it in the courts within six weeks of its confirmation. The procedure for obtaining judicial review was improved by replacing the prerogative writ with a cheaper and quicker method; by directing the action to be heard by a single High Court judge instead of the Divisional Court; and by excluding a right of appeal to the House of Lords except with the consent of the Court of Appeal. The court could quash an order of the Minister if it was ultra vires, but not on the ground of irregular procedure unless the interests of the applicant had been substantially prejudiced.

Parliament doubtless believed that these changes had smoothed the path both for local authorities zealous to promote slum clearance and also for the Minister of

<sup>8</sup> [1931] A.C. at p. 531.

Health as the responsible department. Some of the cases which followed showed that both central and local authorities were by no means out of the wood.

#### CLEARANCE ORDERS IN THE COURTS

In *Errington v. Minister of Health*,<sup>9</sup> Jarrow Corporation had made a clearance order under the Act of 1930 and submitted it for confirmation to the Minister in the usual way. There was an objection by property owners and the Minister was then under a statutory obligation to cause a public local inquiry to be held and to consider the inspector's report thereon and any objections not withdrawn. In this instance, after the local inquiry, officials of the Ministry received the town clerk and the medical officer of Jarrow and discussed the general situation with them. Representatives of the department also visited Jarrow, met councillors and municipal officials there and with them inspected the area affected by the clearance scheme. Neither the owners nor their representatives were present. They appealed on the ground that the Minister had acted improperly.

Mr. Justice Swift held that the Minister was not acting as a judge deciding an issue between parties but in an administrative capacity. In that capacity he was performing a statutory duty imposed upon him for the benefit of the community. In consequence, so long as he complied with the statutory requirements in regard to holding an inquiry, considering objections and the inspector's report, he might inform his mind in any way he liked and arrive at his conclusion by any means which he considered proper.

The Court of Appeal did not accept this conception of the Minister's function. If no objection is made to the closing order, they said, the Minister deals with the

<sup>9</sup> [1935] 1 K.B. 249.



confirmation of it in a ministerial or administrative capacity and may then make whatever investigations he thinks necessary to inform himself whether it is in the public interest to make the order. But where objections are taken to the order, the Minister is exercising quasi-judicial functions. In performing those functions in the present case he did what a semi-judicial body cannot properly do: namely, he heard evidence from one side in the absence of the other; he viewed the property and formed opinions about it without giving the owners an opportunity to argue against the contentions which the Ministry were inclined to accept. (The Minister thereby offended against the principles of natural justice and his confirming order was quashed.) 'My conclusion', said Lord Justice Maugham,<sup>1</sup> 'is that although the act affirming a clearance area order is an administrative act, the consideration which must precede the doing of that is of the nature of a quasi-judicial consideration, and the Minister is bound to the extent mentioned by the House of Lords in the *Board of Education v. Rice*.'<sup>2</sup>

The decision of the Court of Appeal in this case shows, as Dr. Jennings points out, the absurdity of the language used to describe the powers given by administrative law. When there is no objection to the closing order the Minister is said to act in a ministerial or administrative capacity, though the legal meaning of 'ministerial' is almost the exact opposite from 'administrative' since it betokens an absence of discretion.<sup>3</sup> When an objection has been entered he is exercising a 'quasi-judicial' function. He is then a 'semi-judicial' body. (The distinction is not based on the substance of the function

<sup>1</sup> *Ibid.* at p. 273.

<sup>2</sup> [1911] A.C. 179.

<sup>3</sup> The *Oxford English Dictionary* defines a ministerial act as an act which is a necessary part of a person's official duty, or which is required by law in a given state of circumstances, so that the agent is exempt from responsibility for its propriety or consequences.

but rather on the procedure to be followed. / If a dispute exists between the local authority and a private citizen, the Minister must act according to the principles of natural justice. If no dispute of this kind exists, he is free to act more or less as he pleases, so far as the courts are concerned, provided he does not exceed his powers.<sup>4</sup>

Mr. Justice Swift, whose decision had been overridden in *Errington's Case*, declared soon afterwards that he did not understand the judgment of the Court of Appeal in that case.<sup>5</sup> The whole scheme of the Housing Act is, he thought, opposed to the view which the Court of Appeal had expressed concerning the quasi-judicial nature of the Minister's position in dealing with contested orders. The Minister, he pointed out, if he thinks that a local authority is not clearing areas which ought to be cleared with sufficient speed and efficiency, may take the whole matter into his own hands and do it himself. 'Would he then be acting judicially?' asks the learned judge. 'It seems to me clear that, throughout the Act, he is acting administratively and not judicially.' In *Frost's Case*, Swift, J., held that up to the time when objections to the order were made, the Minister acted in an administrative capacity, and was, therefore, entitled through his officials to advise the local authority concerned on what the terms of the clearance order should be. He accordingly dismissed the property owner's appeal from the order.<sup>6</sup>

Mr. Justice Branson took an equally robust view of departmental needs in a case, also decided in 1935, relating to the compulsory purchase of land at Ringway by the Manchester City Council for a municipal aerodrome. He refused to regard as objectionable a letter written by

<sup>4</sup> *Annual Survey of English Law*, 1934 (published by the London School of Economics), W. I. Jennings, at p. 33.

<sup>5</sup> *Frost v. Minister of Health*, [1935] 1 K.B. 286.

<sup>6</sup> *Ibid.*

an Air Ministry official to the Manchester Corporation stating that the purchase and development of the Ringway site would be a wiser and more profitable course to adopt 'so far as can be foreseen at present', than the enlargement of Barton aerodrome, which would involve large additional expenditure. These observations were expressly declared by the official concerned to be 'general and provisional conclusions' which were liable to modification as a result of a public inquiry. Nor did the learned judge object to the inspector who conducted the inquiry, accompanied by his expert assessor, flying over the Ringway site in an aircraft piloted by a prospective witness for the corporation.<sup>7</sup>

An equal latitude was given to the Minister of Health the following year in *Offer and Another v. Minister of Health*.<sup>8</sup> In this case the Court of Appeal held there was nothing improper or objectionable in an official of the Ministry giving advice to a local authority concerning the type of properties which other local authorities were including in clearance orders. The local authority had after the interview made a closing order to which property owners objected. A local inquiry was held, and the Minister subsequently confirmed the order. The owners appealed against the order on the ground that in confirming the order the Minister had not acted judicially. Counsel argued that, in giving the advice which he did, the Minister acted in a manner inconsistent with the exercise of his judicial powers at a later stage. The Minister, he contended, must not give advice about a matter which is going to be the subject of future judicial action on his part. This argument, if accepted, would have completely stopped a large part of the essential work

<sup>7</sup> *Re Manchester (Ringway Airport) Compulsory Purchase Order*, 33 L.G.R. 314 (K.B. 1935); 153 L.T. 219.

<sup>8</sup> [1936] 1 K.B. 40.

of the Ministry of Health. Fortunately, the Court of Appeal found no difficulty in rejecting it and upholding the decision of Swift, J., in favour of the Minister.

#### THE MINISTER'S ADVISORY POWERS

In *Horn v. Minister of Health*,<sup>2</sup> further difficulties were encountered by Mr. Justice Swift in his efforts to understand the decision of the Court of Appeal in *Errington's Case*.<sup>1</sup> The Corporation of Sunderland had made a compulsory purchase order under the Housing Act, 1930, affecting some farm land owned by the plaintiff. He objected to the confirmation of the order and a public inquiry was held by an inspector of the department. A few days later, prior to publication of the Minister's decision, a deputation from the Sunderland County Borough Council, consisting of the chairman of the Health Committee, the medical officer, borough engineer and treasurer, was received by a principal of the Ministry of Health. There was a general discussion about the action which the council proposed to take to fulfil their obligations under the Housing Act, 1935. The compulsory purchase order was not mentioned or discussed, but shortly afterwards it was confirmed by the Minister.

On appeal to the High Court, Swift, J., quashed the order, conceiving the case to be covered by the decision of the Court of Appeal in *Errington's Case*. He could see no difference between the Minister visiting a town through his officials, which occurred at Jarrow in the *Errington Case*, or the town sending its representatives to confer with the Minister, as Sunderland had done. But, he said, even if he were not bound by precedent, he would have thought that in this case justice would not seem to have been done by the Minister, though there was no bad faith. 'It is one of the difficulties caused by this system of

<sup>2</sup> [1937] 1 K.B. 164.

<sup>1</sup> *Ante*, pp 393-4.

administration under these Acts, where a Minister is partly administrator and partly judge, that people do not quite know what he is. He varies from time to time, and people go to him when they should not, and he hears them when he should not.’<sup>2</sup>

Once again Mr. Justice Swift was reversed by the Court of Appeal. His decision had failed to draw a crucial distinction based on the relation between the subject-matter of the conference and the content of the order. In *Errington’s Case*, facts and arguments were discussed privately with the Minister in order to persuade him to make the clearance order. In *Horn’s Case*, on the other hand, what was discussed with the Minister had no relation whatever with the compulsory purchase order. There was no identity of subject-matter.

Slessor, L.J., said that the Minister has specific powers of advising local authorities in respect of their housing functions, and quoted a passage from his judgment in *Offer’s Case*, in which he had stated that if the Minister has the right to give advice and also has the duty imposed upon him under section 2 of the Housing Act of confirming orders, it follows that he must, or may, carry out both these powers, and they cannot be said to be contrary to each other when the Legislature has, in fact, given him the authority to do both the one and the other—namely, first, give the advice, and, secondly, to consider quasi-judicially the confirmation of the order. ‘Therefore, once it is shown that this is a case where it cannot be certain that there is any direct influence or interference with the quasi-judicial powers of the Minister in considering the order, then . . . the case does not fall directly within *Errington’s Case*, but within . . . *Offer’s Case*. . . .’<sup>3</sup>

Lord Justice Scott agreed with the Solicitor-General’s argument for the Minister that ‘where public departments

<sup>2</sup> [1937] 1 K.B. at p. 173.

<sup>3</sup> [1937] 1 K.B. at pp. 182, 183.

are given under this type of Act quasi-judicial duties, as well as administrative duties, the need of their carrying out their quasi-judicial duties in strict accordance with natural justice must always be considered in the light of their administrative duties also. The administrative duties have to be carried out as part of the policy of Parliament imposed upon the Minister by the statute which he is administering, and Parliament must be taken quite deliberately to have decided that the performance of his administrative duties under the Act is compatible with the exercise of his quasi-judicial functions'.<sup>4</sup> In his view, this case illustrated very clearly how the two types of duties can go together and be compatible with one another.

What Dr. Allen calls the 'baffling schizophrenia of the executive official' who has to exercise a number of judicial powers in order to reach an administrative act, was thus solved, or perhaps shelved, by 'a polarisation of Ministerial personality' which he finds it difficult for ordinary mortals to comprehend, and which must present administrative officials themselves with serious practical difficulties if they are to act in their various capacities in a manner acceptable to the courts.<sup>5</sup>

All these problems arising from the multifold capacity of the Minister would not arise if a specific tribunal were established in a department to perform the judicial functions which are at present often left to be carried out by the Minister in an undifferentiated manner from the rest of his department's duties.

Two further efforts by property owners to press their claims in the courts in relation to clearance orders may be noted. In *Fredman v. Minister of Health*,<sup>6</sup> the owner

<sup>4</sup> [1937] 1 K.B. at p. 186. See also as to the Minister's duties, *Stafford v. Minister of Health*, [1916] 1 K.B. 621; *Miller v. Minister of Health*, [1946] 1 K.B. 626; and *Price v. Minister of Health*, [1947] 1 All E.R. 47.

<sup>5</sup> *Law and Orders*, p. 147.

<sup>6</sup> (1936), 154 L.T. 240.

contended that he had a right to appear before, and be heard by, the local authority at the meeting at which they passed a resolution declaring an area to be a clearance area under the Housing Act, 1930. This right was denied and the application dismissed by the court.

In a recent case<sup>7</sup> relating to the validity of a compulsory purchase order resulting from a clearance order made under the Housing Act, 1936, the essential question was the jurisdiction of the court. To what extent, Mr. Justice Croom-Johnson asked, is the court empowered to examine into a matter of local administration which has been deputed to be dealt with by the local authority, subject only to confirmation by the Minister under various safeguards laid down by the statute? In his view, the court's functions are confined within very narrow limits. It does not include inquiring into the adequacy of the evidence before the Minister in deciding to confirm the local authority's order, but it is limited to the question whether the Minister had some evidence before him on which he could hold, if he thought fit, that the premises were unfit for human habitation. The learned judge referred to *Summers v. Salford Corporation*,<sup>8</sup> in which the House of Lords had decided that a house with a broken sash cord is unfit for human habitation after he and a majority of the Court of Appeal had come to a contrary opinion.

#### THE INSPECTOR'S REPORT

In *William Denby & Sons, Ltd. v. Minister of Health*,<sup>9</sup> the property owner claimed to be entitled to see the report made to the Minister by the inspector whom he had appointed to hold a public local inquiry. This plea

<sup>7</sup> *London County Council (Riley Street, Chelsea, No. 1) Order, 1938*, [1945]

2 All E.R. 484.

<sup>8</sup> [1943] A.C. 289.

<sup>9</sup> [1936] 1 K.B. 337.

was, in effect, an attempt to go behind the *Arlidge* decision, and was rejected by Mr. Justice Swift. The person who holds the inquiry, he said, is an administrative officer helping to administer an Act of Parliament, but he approximates more nearly to the position of a judicial functionary. He must observe the rules of natural justice in conducting the inquiry, but beyond that he need not go. His inquiry must be fair to all the interested parties. He must hear everything which any of them desire to say, and he should not hear anything without giving the other parties an opportunity to answer what is said. He must not receive or listen to anything from one party behind the back of the other. Though not bound in any sense by the rules of evidence or procedure applicable to the law courts, he must comply with the ordinary dictates of natural justice in regard to the manner of obtaining and considering material on which to form the opinions or conclusions in his report.

It is obvious from this and other cases that the words 'judicial' and 'administrative', when used by the courts, have ceased to have any clear meaning from an analytical standpoint. Their chief significance is in indicating to which particular functions the courts will apply the rules of natural justice and to which they will not apply them.

#### THE CULT OF THE 'QUASI'

*Cooper v. Wilson*<sup>1</sup> was a case of a somewhat different kind, which illustrates forcibly the confusion of language and of thought caused in the courts by the report of the Committee on Ministers' Powers. In a borough the right to dismiss a police constable is vested solely in the watch committee. The question in issue here was whether the presence of the chief constable at a meeting of the watch committee when they were deliberating whether

<sup>1</sup> [1937] 2 K.B. at p. 309.



they would confirm his provisional dismissal of a constable invalidated the proceedings.

Although an application to the watch committee to discharge a constable takes the form of an application to confirm the chief constable's decision, said Lord Justice Greer, it is none the less an application to the watch committee to dismiss, and must be heard and determined by them 'acting judicially or quasi-judicially'.<sup>2</sup> Scott, L.J., stated that under the police regulations made by the Home Secretary, the watch committee is made a domestic tribunal. Its functions, he continued, approximate to the judicial rather than the quasi-judicial. He then made an unconvincing attempt to apply the reasoning of the Committee on Ministers' Powers to the case, and wound up by saying that the watch committee was 'constituted as a quasi-judicial court to hear the appeal', but had failed to conform to the essential requirements of justice.<sup>3</sup> In the result, the Court of Appeal decided that the watch committee's proceedings were invalid.

Whatever else the watch committee is, it is certainly not a domestic tribunal. Whatever other functions it may perform, its essential task is to administer the local police force subject to the regulations of the Home Secretary and the general policy of the local authority. The 'law' relating to the appointment and dismissal of police constables leaves ample room for the watch committee to be guided by considerations of 'policy' in the formulation and application of principles. If we regard the watch committee as, in respect of part of its work, an administrative authority exercising judicial functions, and thus acting as an administrative tribunal, we shall be nearer the truth and we shall have cleared the air of much ambiguous and nebulous phraseology. The

<sup>2</sup> [1937] K.B. at p. 317.

<sup>3</sup> *Ibid.* at pp. 327, 340, 341, 348.

functions which it exercises in that capacity are those in which it is called upon to hear and determine a controversy between parties, either in the first instance or on appeal or by way of an application to confirm the chief constable's decision.

This is surely simpler, more lucid and nearer the truth than the picture conjured up of a quasi-judicial court presided over by a quasi-judge administering quasi-law in quasi-disputes. The quasi-parties give their quasi-evidence; the tribunal finds the quasi-facts and considers the quasi-precedents and the quasi-principles. It then applies the quasi-law in a quasi-judicial decision which is promulgated in a quasi-official document and given quasi-enforcement. The members of the tribunal, having concluded their quasi-judicial business, then go out and drink quasi-beer before taking lunch consisting of quasi-chicken croquettes. They then go home to their quasi-wives.<sup>4</sup>

#### THE PROCEDURE OF ADMINISTRATIVE TRIBUNALS

The attitude of administrative tribunals towards the question of evidence is a matter of widespread importance which the courts have recently been asked to consider. *Mowon v. The Minister of Pensions*<sup>5</sup> is a significant case, for the principles there laid down are applicable, not only to pension tribunals, but to many other types of tribunal.

The rules applicable to Pension Appeal Tribunals provide that the Minister shall prepare a 'statement of the case' setting out the relevant facts relating to the claim, including the applicant's medical history, with the Minister's reasons for making his decision. This statement is to be sent to the applicant, who may submit a statement setting out in what respects he disputes the

<sup>4</sup> Disciples of the quasi should read 'Administrative Quasi-Legislation', by R. E. Megarry, 60 *Low Quarterly Review*, p. 125.

<sup>5</sup> [1945] K.B. 490.

facts and his reasons for thinking the decision wrong. The applicant is to attach thereto any documentary evidence he can obtain and any additional material bearing on the claim. The Minister may make further comments in reply.

The rules deal also to some extent with the tendering of evidence to the tribunal. They state that the appellant and the Minister may each call a doctor or any other witness and may produce at the hearing any further documentary evidence not already in the possession of the tribunal. The tribunal may itself summon expert or other witnesses. It is not to refuse evidence tendered to them only on the ground that it would be inadmissible in a court of law.

The appellant served as a gunner in the R.A. from November, 1940, until his discharge in June, 1948. During a considerable part of that period he served with an anti-aircraft unit and was engaged in fighting off air-raids. He was admitted to hospital suffering from schizophrenia and was discharged for that disability, which had not been noted on his medical examination on enlistment. He had never previously suffered from this or any similar disease. He attributed his mental state entirely to the effects of his experiences in the forces.

The Minister refused to grant a pension, and gave his reason that 'schizophrenia is a common mental disorder of constitutional origin which characteristically manifests itself without regard to external circumstances. In the experience of the Ministry, the disorder is no more prevalent among service personnel than amongst civilians. . . . In the Ministry's view, nothing occurred in service which can be held to have precipitated the condition or contributed to its worsening, and the Ministry is unable to certify that Mr. Moxon's disorder was either caused, or its progress accelerated, by any war service factor'. This statement was not signed by

anyone, and counsel for the appellant contended before the tribunal that it was not evidence. The tribunal held that it was. The medical member of the tribunal advised them that the reasons set out in the Ministry's decision were, in his opinion, correct, and so also were the inferences drawn from the facts. The tribunal held that the medical member was charged with a duty to advise them whether the Minister's reasons for rejecting the claim were acceptable in the light of his medical knowledge and experience.

The case went to the High Court on the question whether there was evidence within the meaning of article 4 (3) of the Royal Warrant on which the tribunal could reject the claim. This article states that where an injury or disease which has led to a man's discharge or death during war service was not in the report of his medical examination on recruitment, the disablement or death shall be accepted as due to war service unless the evidence shows the contrary. This gives the claimant the benefit of any reasonable doubt.

The court held that although the tribunal is entitled to give due weight to the Minister's reasons for an adverse decision and be guided by their medical member's advice in medical matters, it does not follow that the 'reasons' are to be treated as equivalent to a written report signed by a medical man. 'It is impossible', said Tucker, J., 'even when dealing with tribunals which are not bound by the strict rules of evidence, to hold that statements, whether of fact or expert opinion, contained only in the judgment under appeal, and without any other support, oral or documentary, can be regarded as any evidence of the correctness of such facts or opinions, much less as sufficient to shift the onus of proof which lies on the Minister'.

In another important passage Tucker, J., asked whether, apart from the Minister's decision, the tribunal

could have arrived at the same conclusion on the advice of its medical member on the proved facts of the case. In his view, they could not properly have done so, for although the medical member's function is clearly to advise the other members in the medical inferences to be drawn from the established facts, it is of the essence of evidence that it should consist of oral or written statements communicated to both parties before the decision is reached. Observations made by the medical member to the other members in private do not constitute evidence and cannot be relied upon to discharge the onus of proof resting on the Minister. Where the Minister seeks to support his decision with written statements of a medical character, they should bear the name and qualifications of the author.

The court allowed the appeal on the ground that neither the Minister's statement of the case nor the medical member's advice amounted to evidence. The valid evidence did not suffice to free the Minister from the burden of proof placed on him by the Royal Warrant.

*R. v. Newmarket Assessment Committee, ex p. Allen Newport, Ltd.*<sup>6</sup> was a rating case, but the question under consideration concerns administrative tribunals in general.

The owners of a ballast pit were served with notice by the rating and valuation officer of a proposal to include the undertaking in the valuation list at an annual value of £2,500. The owners objected on the ground only that the pit was not treated as an industrial hereditament and therefore entitled to derating as to three-quarters of its value. They wrote to the rating officer saying that if he consented to have it so treated it would not be necessary for them to appear before the assessment committee. The officer agreed to this proposal and said he would inform the committee accordingly. It was therefore agreed by the officer and the applicants that, in the

<sup>6</sup> [1945] 2 All E.R. 371.

latter's absence, he would apply for the pit to be inserted at £2,500 subject to derating.

When the committee met, a representative of the county valuation committee attended and put forward arguments or evidence to the effect that a much higher assessment should be substituted. The committee listened to him and subsequently informed the owners that the valuation proposed to be inserted was £2,500, but 'the valuation to be inserted in the list as provisionally determined by the committee' was £18,000 subject to derating; and that this would be confirmed at a subsequent meeting unless the owners gave notice of objection within fourteen days.

The owners then applied for certiorari to quash the decision as invalid on the ground that the committee had no jurisdiction to insert a figure larger than £2,500. The Divisional Court granted the order on the different ground that the assessment committee had not acted judicially as it was bound to do in law. They sat in the absence of the owners (who were liable as occupiers) and took into consideration matters of which the owners knew nothing and of which they had not been notified. They decided the matter on evidence heard behind the back of the most interested party, and they could not justify such improper action by saying that their decision was only provisional. Such a term has no meaning in this context and will not serve to rectify the determination of rights otherwise than in a judicial spirit. Humphreys, J., remarked that a court of law could not say to one of the parties, 'I have decided this case, but if you can satisfy me that my decision is wrong, I will hear you'. That is not the way in which persons are permitted to act who are bound to act judicially.

The same principle was upheld in more interesting circumstances in *R. v. Architects' Registration Tribunal*,

*ex p. Jaggar.*<sup>7</sup> Here the applicant was a borough engineer, surveyor and architect who had applied unsuccessfully to be registered as an architect under the Architects' Registration Acts, 1931 and 1938. These statutes established a register of architects to be kept by the Architects' Registration Council. An Admission Committee was created by the Act of 1931, whose duty is to report to the council on the qualifications of any applicant who seeks registration. The Act of 1938 set up a statutory tribunal, consisting of persons not members of the council, appointed by various departments and persons, to whom anyone whose application had been refused could appeal.

This tribunal had laid down certain criteria to be satisfied by anyone claiming to be entitled to registration by virtue of having practised as an architect. The criteria included the possession of æsthetic and practical skill in originating, designing, planning and supervising the erection of buildings, etc. The applicant contended that the tribunal had in doing so exceeded its powers, for it had laid down a test of whether a man was a competent architect instead of whether he had merely been practising as an architect. The Divisional Court rejected this argument on the score that the word architect itself implies a considerable degree of skill and knowledge. They also brushed aside an attempt to invalidate the proceedings of the tribunal on the ground that its clerk (who takes no part in its deliberations) is also clerk to the Statutory Admission Committee and registrar to the Registration Council. To suggest that this slender clerical link serves to prevent the tribunal from approaching its task with an open mind was more than the court was prepared to swallow.

The applicant succeeded, however, on the plea of evidence heard behind his back. This consisted of papers

on a file which had been before the Admission Committee and which he was not permitted to see. They included letters from his referees and from other persons commenting on his qualifications. This file was unwisely placed before the tribunal. In the court's opinion, it was sufficient to give them a jaundiced view of the application which Mr. Jaggar had no opportunity to rebut. It is clear that the question of regularising the evidential aspects of administrative tribunals is a matter requiring attention.

#### JUDICIAL REVIEW CONSIDERED

From this survey of the recent cases relating to the performance of judicial functions by administrative organs certain conclusions emerge. Firstly, the control exercised by the courts is at bottom of a very superficial character, since it touches the form of the proceedings rather than the substance of the decision. The rules of natural justice are unquestionably valuable, both subjectively and objectively. If they are violated, injustice may be done and the parties may have a psychological sense of grievance. But even if they are observed with the utmost zeal, injustice may still be done. In short, natural justice is not nearly enough. The rules it dictates do little to ensure satisfactory decisions in the complex world of public administration in which we live.

Secondly, in the exercise of their supervisory jurisdiction over administrative tribunals the courts have scarcely developed this branch of the law at all during the past thirty years. The rules of natural justice were evolved in the nineteenth century, and they have been almost static since the *Arlidge Case* in 1915.

Thirdly, if administrative tribunals are to operate in a satisfactory manner, some form of appeal from the substance of a decision is required in the more important



cases. This is provided in regard to the claims which arise under the national insurance schemes, where administrative appeal tribunals are specifically provided. The same applies to the licensing decisions of the Area Traffic Commissioners, where an appeal lies either to the Minister of Transport in respect of passenger services and to the Road and Rail Appeal Tribunal in regard to goods vehicles. But in many instances there is no method of appeal apart from the limited grounds on which an appeal can be brought before the courts, either on a point of law or by virtue of the exercise of the supervisory jurisdiction.

We may turn now to a different field of activity, namely, patent law and administration, in which some interesting developments and discussions have taken place since 1930 in regard to the machinery of adjudication. We shall find here a reflection of some of the most significant problems of administrative law.

#### THE LAW OFFICERS AND PATENT APPEALS

Prior to 1883, the Law Officers of the Crown determined exclusively whether or not a patent should be granted, subject to a right of appeal to the Lord Chancellor. The Patents, Designs and Trade Marks Act of that year transferred these and cognate duties to the Comptroller-General of Patents, but applicants and opponents to the grant of a patent or the amendment of a specification were afforded an appeal to the Law Officers. The broad line of division between the jurisdiction of the Law Officers and that of the courts was that all appeals from the Comptroller's decisions up to the time when a patent was granted, together with appeals relating to the amendment of a specification, went for final decision to

a Law Officer; while appeals in matters arising after the grant of a patent lay to the High Court.

The system was criticised by the Departmental Committee (presided over by Lord Justice Sargant) on the Patents and Designs Act and Practice of the Patent Office in 1931.<sup>8</sup> They referred to complaints which had been made of the great delay caused by the Law Officer's preoccupation with his Parliamentary and other duties, but gave no details of the average time which elapsed before an appeal was concluded. A second ground of criticism was that the Law Officer (in practice the Solicitor-General normally took this business) was frequently inexperienced in technical matters and, therefore, an unsatisfactory tribunal. Other witnesses contended that the existing procedure was cheap and adequate, and stated that it would be against the interests of the parties to transfer appeals to a judge in chambers or to the High Court.

No one appears to have noticed, nor did the Sargant Committee themselves remark, that one cause for the lack of zeal which some Law Officers displayed in the prompt dispatch of patent appeals lay in the fact that fees were not paid to them for the exercise of this particular function. Nor did the committee even discuss the extent to which a High Court judge was likely to have more specialised knowledge of patent questions than the Solicitor-General. They merely stated that 'a judge conversant with these matters would be a more satisfactory tribunal for hearing these appeals than a Law Officer who may have had no experience at all of the subject-matter'.<sup>9</sup> The converse would, of course, be equally true if one compared a Law Officer with Patent Bar experience with a judge unversed in patent law and

<sup>8</sup> Departmental Committee on the Patents and Designs Act and Practice of the Patent Office. Third and final Report. Cmd. 5066/1931, pp. 62-3.

<sup>9</sup> Report, p. 64.

devoid of scientific training. The committee admitted that they were impressed by the testimony of witnesses who feared that a transfer of the Law Officers' judicial functions to the court or a judge in chambers would increase the expense falling on the parties; but they thought this danger could be avoided. They accordingly recommended that appeals which had hitherto gone to the Law Officer should be heard instead by a judge of the High Court selected by the Lord Chancellor. It is noteworthy that no mention was made in this recommendation that the judge should possess special scientific technical or legal qualifications. The committee advised that the persons who had audience before the Law Officer, which included patent agents, should continue to have audience before the court in these matters.

The Patents and Designs Act, 1982, gave effect to this recommendation by establishing, for the purpose of hearing appeals from the decision of the Comptroller-General of Patents, an appeal tribunal. This consists only of a High Court judge nominated by the Lord Chancellor. The judge may, if he wishes, obtain the assistance of an expert to act as assessor. The appellate functions of the Law Officers in relation to patents were thereupon transferred to this appeal tribunal.<sup>10</sup>

As regards the Comptroller-General of Patents, a majority of witnesses who gave evidence before the committee were in favour of extending his jurisdiction so as to enable him to try 'comparatively simple and unimportant actions in regard to infringement and invalidity'.<sup>11</sup> These proposals sprang from a desire to substitute a cheaper method of determination in minor cases.

The British Science Guild had in particular strongly urged that the Comptroller should be empowered to act

<sup>10</sup> See also Patents Appeal Tribunal Rules (1982), S. R. & O. 887.

<sup>11</sup> *Ibid.* p. 84.

as a court, subject to a definite limit of damages and to the consent of both parties, for deciding questions relating to the infringement of patent rights and for deciding at any time upon petitions and counter-claims for the revocation of patents on all the usual grounds of invalidity. The parties were in each case to agree beforehand whether his decision should be final or subject to appeal.<sup>1</sup>

The Patent Office gave evidence to the effect that the Comptroller-General would be quite willing and able to determine certain classes of cases relating to invalidity and infringement. It was also pointed out that the Patent Offices of other leading industrial countries exercised a wider jurisdiction than our own; and that the special scientific knowledge and experience of the Patent Office staff should be utilised in order to obtain at small cost decisions of the kinds mentioned above.

#### THE SARGANT COMMITTEE

A majority of the committee opposed the suggestion on doctrinaire grounds. 'The Comptroller', they said, 'is an executive officer, and it is inappropriate to put upon him more judicial duties than are necessarily incidental to the grant of patents and the supervision of the register.'<sup>2</sup> Parties in dispute about patent rights can seldom agree as to the tribunal or the limit of damages, therefore (so the argument ran) let not this opportunity of doing so be afforded to them! The most efficient remedy for the enforcement of patent rights is an injunction rather than damages, and no one had dared to propose that the Comptroller should be able to grant an injunction, though the reason for this was not stated. And finally, declared the majority of the committee in

<sup>1</sup> *Ibid.* p. 65.

<sup>2</sup> *Ibid.* p. 66.

what they no doubt regarded as an overwhelming argument, 'to empower the Comptroller to act as an arbitrator would amount to a statutory indication that he is a person specially fitted to deal with questions of enforcing a patent as between subject and subject'. At present he has no jurisdiction at all in regard to enforcement, which is 'rightly left to the ordinary tribunals of the country'.<sup>3</sup>

For these feeble and conventional reasons the committee decided by a majority not to recommend an extension of the Comptroller's jurisdiction. They made no reference whatever to the problem of expense, which was said to be so high that many disputes remain undecided, with consequent injustice.<sup>4</sup> A substantial minority of the committee urged that an attempt must be made to provide a cheaper and speedier means of determination than that provided by the High Court. As the committee was debarred from considering improvements in the organisation or methods of the courts, such as the constitution of a special court to deal with actions relating to patents and other forms of industrial property, the minority favoured extending the Comptroller's judicial powers so as to authorise him to deal with disputes relating to infringement and invalidity. The minority observed that though it may be true that the Comptroller is primarily an executive officer, it is equally true that many of his duties are of a judicial character. In any event, they were neither alarmed nor deterred by the terrifying spectre which haunted the majority.

In regard to designs, the committee received evidence suggesting that all appeals should be heard by the Law Officers on the ground that the expense of an appeal to the court is prohibitive, with the result that 'the right of appeal in these cases has become a dead letter'. The

<sup>3</sup> *Ibid.* p. 66.

<sup>4</sup> *Ibid.* p. 65.

committee complacently brushed aside these proposals with the recommendation that all appeals relating to designs should lie to the special judge to be selected by the Lord Chancellor for patent cases.<sup>5</sup>

#### THE BUSINESS OF THE COURTS COMMITTEE

In 1936 the Business of the Courts Committee again took up the question of delegating the hearing of minor patent actions to the Comptroller of Patents or a special officer of his department. The committee was composed of two Lord Justices of Appeal, five High Court judges, two King's Counsel (one of them Permanent Secretary to the Lord Chancellor) and only two other persons. With such a membership its bias in favour of ordinary courts was inevitable.

It was not surprising, therefore, that the committee should declare that there was a predominant opinion against the delegation of patent actions to any special officer inferior to a judge of the High Court. 'It has been pointed out to us', remarked the committee, 'that the Comptroller, though no doubt he exercises some quasi-judicial functions, is an administrative officer with a heavy weight of administrative functions upon him. It is obvious that there might be grave administrative objections to the proposals. . . . In any case, we are not satisfied that the proposal offers any advantages. No one has suggested that the hearing of any but what are somewhat vaguely termed minor patent actions should be so delegated, and we doubt whether there would be any substantial reduction of costs. While the expense of the larger patent actions is no doubt very heavy, we have no reason to believe that small patent actions, of the type

<sup>5</sup> Page 71.

that occupy a day's hearing, are more expensive than other litigation of similar importance.'<sup>6</sup>

This, of course, was to beg the whole question. If litigation of a particular class is too expensive for the means of those concerned, and if this state of affairs leads to a denial of justice, there is no merit in the argument that the cost is no greater than that involved by other classes of litigation. The argument may show the need for lowering the cost of those other classes of actions; it cannot possibly justify that attitude of lofty indifference to the burden of costs which is so frequently displayed by the judiciary and other members of the legal profession who do not have to meet the expense.

The Business of the Courts Committee did not favour the delegation of judicial powers to an officer attached to the Patent Office whose functions would be exclusively judicial. This suggestion would, in effect, have set up a specialised inferior tribunal to deal with certain classes of patent business. For reasons which they omitted to disclose, the committee thought there would be substantial difficulties in defining the type of business suitable for this tribunal. They were not satisfied that there was a substantial demand for it; or that it would result in greater economy or expedition. The jurisdiction suggested for such a tribunal would not include the unduly long or costly patent actions.<sup>7</sup>

It is odd that judges of the higher courts, so much of whose time is spent in sifting, analysing and weighing evidence presented under the most rigorous rules of procedure and of proof, should themselves be content to deal with matters of public importance in so loose and unsubstantial a fashion. The relative merits as tribunals of appeal of the Patent Office, on the one hand, and

<sup>6</sup> Business of the Courts Committee. Third and Final Report. Cmd 5066, 1936, pp. 12-13.

<sup>7</sup> *Ibid.* p. 13.

the High Court on the other, should be susceptible of demonstration in fairly precise terms on the basis of their respective functions, personnel and procedure. In any event, the testimony of witnesses, such as patent owners, patent agents, inventors, practising solicitors and counsel could and should have been obtained and cited. The Business of the Courts Committee seemed to think it sufficient to make vague and unverifiable statements, of the kind mentioned above, without any attempt to demonstrate the truth of them or to show the facts, if any, on which they were supposed to be based.

The need for a scrupulously careful investigation and presentation of the evidence was particularly necessary in those parts of the report where the committee were in a sense, acting as judges of their own cause. That is, in matters touching the interest of the judiciary. But no awareness of this appears to have occurred to the committee. In rejecting a proposal for a specially qualified judge to deal with patent business, the committee stated that: 'as matters now stand, judges who have had no special training or experience in patent actions, have to learn and do learn to deal with such matters; and we believe that on the whole such judges provide courts which command the confidence of the litigants'.<sup>8</sup> Yet four years earlier the appellate functions of the Law Officers had been transferred to a High Court judge on the specific ground that the Law Officer was often without experience in patent matters. The argument which applied to the Solicitor-General apparently ceased to apply to a Law Officer who had attained the judicial office to which he is traditionally entitled.

#### THE SWAN COMMITTEE

Even now, however, the matter had not been finally disposed of. It was reopened by another departmental

<sup>8</sup> *Ibid.* p. 13.



committee on the Patents and Designs Acts appointed in 1945. The Swan Committee (as it is called) dealt first, as a matter of urgency, with the reform of the procedure relating to extension of the term of patents where the patentee had suffered loss or damage in that capacity as a result of the war.

Applications for an extension of time had hitherto been heard and determined by the High Court, the Comptroller of Patents appearing in the proceedings as custodian of the public interest. Both he and the applicant were almost invariably represented by counsel and solicitors. The cost to the patentee of this procedure *in the average simple unopposed case* varied between £150 and £200. This figure covered only an interim extension pending the assessment of the full war loss. When this had been ascertained, further applications at additional cost would be required. This heavy cost, said the committee, had been represented to them as tantamount to a denial of justice to the large body of patentees who cannot afford to incur expenses on this scale. The committee therefore recommended that the existing practice was in urgent need of modification.<sup>9</sup>

The reform favoured by the committee was that the comptroller should be invested with powers to deal with applications for extension of the term of a patent, with a right of appeal to the Patents Appeal Tribunal. If a patentee preferred to apply to the High Court, he should be at liberty to do so. The comptroller should also be entitled to refer to the court any specially difficult case.<sup>1</sup> This proposal is now embodied in the Patents and Designs Act, 1946.

The option which a patentee has under these arrangements of applying either to the comptroller or the court raises no new principle, for, as we have seen, a similar

<sup>9</sup> First Interim Report. Cmd. 6618/1945, para. 11.

<sup>1</sup> *Ibid.* para. 17.

alternative procedure exists under the Trade Marks Act, 1938.<sup>2</sup> This procedure was first introduced in 1919; and the committee noted that it had clearly met the demand for a cheaper method of adjudication, since during the ten years between 1934 and 1944, no fewer than 345 applications were made to the registrar as compared with thirty-three to the court.

Two members of the committee (both of them practising members of the legal profession) dissented from the committee's proposals on the ground that judicial functions should be conferred on executive officers only in cases of overriding necessity or expediency. They thought that unnecessary expense could be avoided in the present instance by delegating powers to the Masters in Chancery. Their colleagues were convinced that this would not adequately meet the situation and that a more radical change was required.<sup>4</sup>

In their second report the Swan Committee covered wider ground relating both to the adequacy of the existing patent law and the machinery of its administration. They proposed that the Comptroller-General's powers should be extended in various ways. For example, he should be empowered to reject applications for patents on the ground of 'lack of subject-matter', by which is meant absence of inventive merit. He should be similarly authorised to entertain this ground in proceedings to oppose the grant of a patent or to secure its revocation. Some of the proposals are of too technical a nature to describe without embarking on a lengthy exposition of the mysteries of patent law.<sup>5</sup>

The Swan Committee considered whether it would be desirable to confer on the comptroller power to reject

<sup>2</sup> Section 32, *ante*, p. 140.

<sup>4</sup> First Interim Report, paras. 13, 16 and appended Note.

<sup>5</sup> Second Interim Report. Cmd. 6789/1945, paras. 76-85.

applications to patent inventions which appear to him lacking in novelty or subject-matter owing to prior usage. The ascertainment of the fact whether an alleged invention has been previously used is, they pointed out, 'notoriously a matter which requires the most careful investigation and complete proof'.<sup>6</sup> They nevertheless considered the comptroller quite able to decide such questions provided the matter were argued before him by interested parties prepared to produce evidence in support of their contentions. They therefore recommended he should be given the power to decide such questions in opposition or revocation proceedings.

The committee gave further consideration to the idea of authorising the comptroller to try cases of alleged infringement of patent which had been adversely regarded by the Sargant Committee in 1931. In spite of all the objections raised by that body, the Swan Committee reported in favour of conferring a jurisdiction of this kind on the comptroller where the parties agree to submit the dispute to his decision and to accept his pronouncement as final. He should be able to award damages up to a maximum sum of £1,000.<sup>7</sup>

' ACCORDING TO THE EVIDENCE '

The Swan Committee also considered at some length the trial of patent actions. For this purpose they took the unusual step of issuing a questionnaire to selected persons and organisations asking for their views, among other things, on whether the present method of bringing patent actions in the High Court was satisfactory. When a negative answer was given, witnesses were invited to make suggestions for improving the present practice with a view to reducing the cost of litigation and increasing its speed; for ensuring that specifications in suit and prior documents

<sup>6</sup> Para. 86.

<sup>7</sup> Para. 147.

receive 'an interpretation in harmony and in accord with the knowledge and understanding of those to whom the specification is addressed'; and finally, for 'ensuring that the issues of novelty, subject-matter, utility and sufficiency of description and instructions are also determined in true relation to knowledge, experience and understanding of those acquainted with the art to which the specification relates'. The questionnaire further inquired whether any changes were desirable in the character of the tribunals of first instance, appeal and final decision which at present try patent actions. A number of searching questions were also put on other aspects of the law and procedure of adjudication.<sup>8</sup>

This was indeed an innovation in methods of inquiry into judicial institutions. In place of the sonorous after-dinner platitudes about British justice and complacent assumptions concerning the satisfaction of the public usually found in such documents, witnesses were asked to answer a number of pointed questions on specific matters lying within their experience. The committee evidently desired to inform itself rather than to record its own ready-made opinions.

The results were illuminating. Among the witnesses who appeared before the committee or submitted written memoranda, 'there has not been a single instance in which entire satisfaction with the present procedure has been expressed. On the contrary, dissatisfaction has been the general note'.<sup>9</sup>

Under the present system patent cases are dealt with by the Chancery Division and any of the Chancery judges may be called upon to try an action for infringement or revocation of patent. One of the Chancery judges is from time to time selected by the Lord Chancellor for dealing

<sup>8</sup> *Ibid.* Appendix I. Second Interim Report of the Departmental Committee on the Patents and Designs Act. Cmd. 6789/1945.

<sup>9</sup> *Ibid.* para. 96.

with certain other proceedings in which patents are involved; and this judge hears appeals from the Comptroller-General of Patents in all cases where the issue concerns a patent that has already been granted. Where, however, the appeal from the comptroller relates to an application for the grant of a patent, it goes to another Chancery judge, who presides over the Patents Appeal Tribunal, to which was transferred the jurisdiction formerly exercised by the Law Officers.

The complaints and criticism directed against these confused and confusing arrangements convinced the Swan Committee that there is 'a widespread, in fact a universal, feeling of dissatisfaction'<sup>1</sup> with the present method of trying patent actions. The commonest ground of complaint is the high cost of patent litigation; but the committee also observed 'a very general lack of confidence in the adequacy of the tribunal before which these patent cases come' together with a feeling that the Chancery judges lack the scientific and technical knowledge or experience required to assess the value of expert evidence or to arrive at sound conclusions on inventions affecting highly complex matters in the realms of chemistry, electricity, mechanics or physics. The judge's ignorance of the scientific or technical background makes it frequently necessary for highly paid counsel and experts to spend considerable time—often amounting to several days—in instructing him in the elements of the technology on which an invention is based, in order to enable him to understand the specification.<sup>2</sup> Such a process is bound to be absurdly and unnecessarily expensive.

The employment of an ordinary Chancery judge for patent work possesses, in addition, other disadvantages of an equally serious kind. A judge who is without technical knowledge or experience is unable, even with

<sup>1</sup> *Ibid.* para. 99.

<sup>2</sup> *Ibid.* para. 100.

the assistance of counsel and expert witnesses, to form 'a balanced and reliable view of the true meaning and implications of a specification which is addressed to persons fully acquainted with the art, and therefore couched in language which assumes a competent knowledge of the technique of the art'.<sup>3</sup> He is, moreover, unfitted to choose between the conflicting testimony of expert witnesses; or even to assess it at its true value. Above all, he is at a colossal disadvantage in seeking to determine whether an invention involves a sufficient advance on previous knowledge to endow the patent with subject-matter.

The inability of Chancery judges to comprehend the scientific implications of patent specifications and their failure to grasp the difficulty of describing an invention in accurate and precise language, have led to their expecting a specification to be drafted with the same degree of precision as that which would normally be found in a deed of settlement or an insurance policy. This results in their condemning as bad for ambiguity or uncertainty specifications which fail to attain this exacting standard.

For these reasons, the committee reported, there was complete unanimity among witnesses of all kinds, that patent actions should be tried by judges who are not only lawyers but also have the necessary scientific and technical qualifications for dealing expeditiously and efficiently with this complex and difficult branch of law.<sup>4</sup> They therefore recommended that two judges should be appointed specially to hear patent actions and appeals. They would be barristers who also possess sufficient technical and scientific knowledge to avoid the necessity of turning the

<sup>3</sup> *Ibid.* para. 102.

<sup>4</sup> Para. 106. The Committee recommended that all appeals from the Comptroller's decision should lie to the Patents Appeal Tribunal, in place of the dual system hitherto prevailing.

court into a university extension course in elementary science. They should have previous experience in patent litigation and would therefore presumably be drawn from the Patent Bar. In addition to patent actions, these judges could take trade mark, design and passing-off actions. One of the patent judges would sit as a member of the Court of Appeal when it took patent cases, but he would of course not be the judge who had already decided the case in the court below.

The Swan Committee had grave doubts about allowing an appeal in patent actions to go to the Court of Appeal and the House of Lords. They found a strong consensus of opinion that a limitation on the right of appeal would be beneficial to industry but, in the end, came to the conclusion that, so long as the three-tier system of courts exists in other branches of the law, it would not be right to prevent access to the House of Lords in patent disputes. They accordingly proposed only a minor limitation on the right of appeal.<sup>5</sup>

The committee recommended that the patent judges, and also the Patents Appeal Tribunal, should in all cases be assisted by scientific assessors unless the judge, after hearing the parties, decided that such assistance was unnecessary. The assessor's function would not be to assist in the trial but to elucidate its technical aspects. Members of the staff of the Department of Scientific and Industrial Research and other departments might be seconded for the purpose.<sup>6</sup> It would, moreover, reduce the time and cost of patent actions, where difficult technical problems or lengthy specifications are involved, if the patent judges followed the practice adopted by the hearing officers of the Patent Office, of studying the

<sup>5</sup> Paras. 116-9.

<sup>6</sup> *Para. 100-194*

technical aspects of the case in advance of the hearing with the assistance of the scientific assessor.<sup>7</sup>

#### CONCLUSION

In this somewhat lengthy account of the proceedings of three official committees during a period of fifteen years we see exemplified the struggle to maintain traditional methods of judicial decision in a branch of law where the ever-increasing complexities and difficulties of science and technology make modern methods indispensable to the economic welfare of the nation.

The refusal of the Sargant Committee and the Business of the Courts Committee to extend the jurisdiction of the Comptroller-General of Patents on the ground that he is an executive or administrative officer; the assumption of both these bodies that any Chancery judge is capable of understanding and deciding patent actions dealing with the most abstruse questions of chemistry and physics, though he may never have read an elementary textbook on the subject or have spent an hour in a laboratory; the persistent failure of successive Lord Chancellors to appoint specially qualified judges to deal with these problems; the indifference of the judiciary and the legal profession towards the fabulously high costs and unduly protracted hearings in patent actions; the pipe-dreams about judges without special training or experience commanding 'the confidence of the litigant': all this is very typical of the attitude of the judicature towards emerging situations which demand large adjustments of organisation, qualification and technique if the judicial process is to function in a satisfactory manner.

Now, however, that the issues have been so clearly stated by the Swan Committee, it is clearly only a matter of time before substantial changes are introduced. Reform is, however, long overdue.

<sup>7</sup> Para. 105.



## CHAPTER 8

### TRIAL BY WHITEHALL: AN EVALUATION

The Revival of Administrative Law—The Causes of its Growth—The Evolution of New Standards—The Advantages of Administrative Tribunals—The Disadvantages of Administrative Tribunals—The Bogey of Political Interference—The Structure of Administrative Tribunals—The Personnel of Administrative Tribunals—The Dangers of Administrative Law—The Regulation of Administrative Tribunals—The Control of Domestic Tribunals—Some Constructive Proposals—A Matter for Parliament—Conclusion.

#### THE REVIVAL OF ADMINISTRATIVE LAW

IN preceding chapters we have examined the chief characteristics of the judicial function, both from the institutional and the psychological points of view. We saw that administrative and judicial functions were in early times inextricably blended in undifferentiated organs of governmental authority, and that it was only at a comparatively late date that the courts of law which now constitute the formal judiciary gradually split off from the general executive organs and evolved along distinct lines of their own.

The separation of judicature from administration has at no time been complete, but during the past three quarters of a century, and particularly during the last thirty years, a mass of judicial functions has been entrusted by social legislation to the central departments of government or to administrative tribunals connected directly or indirectly therewith. In this way a new body of administrative law has been introduced into the British Constitution; for although it may be regarded from one point of view as a revival, in the sense that administrative law has existed in previous periods of English history, the form and circumstances in which it appears today

are so peculiar to our own time that the whole movement must really be regarded as a new development.

We have already described at some length the judicial powers which have thus been allocated to administrative tribunals, and we have also mentioned, in order to complete the picture, those which are exercised by unofficial or voluntary bodies such as the executive organs of clubs, friendly societies, professional associations, trade unions, and similar groups fulfilling special functions and exercising jurisdiction over their members. To this latter class we must assign the Marketing Boards established under Act of Parliament and wielding legal powers of a severe penal character over the members of a particular trade. In the following pages we shall endeavour to trace the causes which have led to the establishment of administrative tribunals, to assess the advantages and disadvantages of administrative justice as compared with justice in the courts, to indicate recent trends of policy, and to suggest certain guiding principles that might usefully be followed in future developments in the same field.

#### THE CAUSES OF ITS GROWTH

There are many immediate causes for the growth of administrative law in England, but the underlying explanation is to be found in the vast extension of State and municipal activity which has taken place during the past fifty years. A mere glance at the subject-matter of the legislation which has conferred judicial powers on Government departments is sufficient to demonstrate this. It is in the Acts relating to public health, housing, town and country planning, national health insurance, unemployment insurance, education, motor transport services, merchant shipping, pensions for old persons, widows and orphans that the main sources of administrative law are to be found—all of them extending the realm of public

administration and regulation to spheres undreamed of by the *laissez-faire* individualists of the early and mid-Victorian era. In these and many other fields the social control of private enterprise, or the public administration of social services for the common good, has superseded the old unregulated individualism of the nineteenth century, or the mere lack of provision for widespread social needs which accompanied it.

It was impossible for the executive to carry out these greatly enhanced and extended functions of government so long as its activities were limited by the old individualistic ideas which prevailed in an extreme form in the courts of law. The intense legalism of the English system of law is one of its most notable features, and one which results in a tendency to sacrifice the public welfare to private interests where the latter can lay claim to individual rights. 'It displays', as a foreign observer has said, 'an unlimited valuation of individual liberty and respect for individual property.'<sup>1</sup> It is concerned less with social righteousness than with individual rights. It tries questions of the highest social import as mere private controversies between John Doe and Richard Roe, and is so zealous to secure fair play to the individual that often it secures very little fair play to the public. Even our body of constitutional law is more concerned with the rights of the subject rather than with the claims of the community, or the obligations of citizenship.

Some change in the administration of law was indubitably needed if the new world of social control was to be brought peacefully into existence. Social interests cannot be secured, or a social policy effected, by the application of abstract principles of justice as between man and man.

The development that actually occurred has been, we have seen, the creation of a large number of administrative

<sup>1</sup> Quoted by Roscoe Pound, *The Spirit of the Common Law*, p. 13.

tribunals which were, from the outset, unfettered by the existing legal tradition, and able to break away entirely from the prevailing body of legal doctrine based on private rights. If constitutional law emphasises individual rights, administrative law lays equal stress on public needs; that is, on the duties owed by a citizen to the public,<sup>2</sup> on the subordination of private interest to the common weal. In short, the tendency towards the socialisation of government has been accompanied by a parallel tendency towards the socialisation of law. The invasion of the rule of law by the placing of judicial functions in the hands of officials has been due to what Dicey called 'the whole current of legislative opinion in favour of extending the sphere of the State's authority', which resulted in state and municipal officials having more and more public business to manage.<sup>3</sup>

A similar development has taken place in a somewhat different form in the United States of America, where, as Dean Pound observes, until the establishment in recent times of administrative boards and commissions, 'Law paralysed administration. In the nineteenth century injunctions, actions for trespass and mandamus proceedings hemmed in the executive officer on every side . . . the system of checks and balances produced a perfect balance. In practical result, the law too often accomplished little or nothing'.<sup>4</sup>

It was a revolt from this condition, which had become intolerable in the complex circumstances of American city life at the end of the nineteenth century, that resulted, in the United States as in England, in the creation of a large number of administrative tribunals. In the Federal Government alone there are more than a hundred separate boards and commissions exercising

<sup>2</sup> F. J. Goodnow, *Comparative Administrative Law*, Vol. 1, p. 8.

<sup>3</sup> A. V. Dicey, *Law of the Constitution*, 8th ed., Introduction, p. xxxix.

<sup>4</sup> Roscoe Pound, *The Spirit of the Common Law*, p. 56.

administrative and judicial functions simultaneously (not to mention rule-making powers as well)<sup>5</sup>; and throughout the states there are to be found administrative courts dealing with controversies relating to public utility undertakings, trade practices, workmen's compensation, and industrial disputes.<sup>6</sup>

But although the underlying explanation of the rise of administrative justice in England, as in America, is to be found in the extension of the functions of government to one new sphere after another, and in the consequential need for a system of adjudication which would sanction and enforce the inevitable infringement of individual legal rights which that development made necessary, there has been until recently little or no conscious recognition of this need as the real cause; and the supersession of the courts of law by administrative tribunals has been ascribed to practical requirements of various kinds. Not that the practical reasons were imaginary. The thread of social necessity has many strands; and there have been various practical reasons which have contributed to shift the centre of gravity away from a province wherein property and contract were the dominating forces to one in which the common weal was the paramount consideration. But they have been subsidiary.

Chief among these subsidiary causes has been the desire to provide a system of adjudication which should be at once cheap and rapid. The elaborate methods of investigation employed by the courts of law, the insistence on first-hand evidence, the obligation for witnesses to appear in person, the necessity for proving formally every document and fact relevant to the issue, the requirement

<sup>5</sup> J. Landis, *The Administrative Process*, p. 18-19; R. E. Cushman, *The Independent Regulatory Commission*; Sharfman, *The Inter-State Commerce Commission*; Report of the President's Committee on Administrative Management.

<sup>6</sup> W. H. Pillsbury, 'Administrative Tribunals', 36 *Harvard Law Review*, p. 407.

that pleadings shall be formulated in technical language, the employment of highly trained counsel and solicitors, all these possess great advantages from many points of view, and are necessary for the maintenance and development of the 'artificial reason' of the law, but they make the judicial process inevitably slow and expensive. A measure which aimed, like the Public Health Act of 1875, at compelling the whole nation to change its existing system of domestic sanitation, would never have been put into ubiquitous operation in less than a century if its enforcement had depended on the costly and leisurely methods of the law courts. The Health Insurance scheme would have been unworkable if every contested claim for benefit by an insured contributor had had to be decided in accordance with the ordinary machinery of the law.

Then, again, the mere volume of work involved by certain kinds of social legislation would have thrown an intolerable strain on the existing framework of the judicature. The Unemployment Insurance scheme alone gives rise every year to tens of thousands of separate cases in which claims for benefit are contested before the courts of referees, and the determination of these by the courts of law would have required a very large expansion of the judiciary. It would, moreover, have been quite outside the tenor of English tradition to have enlarged the judicial system merely to cope with a single measure. In the United States the pressure of work has had a similar influence in leading to the erection of administrative tribunals. An American writer, referring to the setting up of the General Land Office in Minnesota, observes that the only reason that can be found for the development of this special machinery to deal with public land controversies is 'the impossibility of handling the volume of business that the land department had to handle by any court machinery. The amount of work done by the

land department at the time of its greatest activity was so great that "doing a land office business" became proverbial'.<sup>7</sup>

#### THE EVOLUTION OF NEW STANDARDS

Even more important as a cause of the growth of administrative law is the fact that in practically every field to which public administration has extended, new standards have had to be set up and maintained.

The National Health Insurance scheme required a standard of medical service and treatment for the insured population to which all doctors on the health insurance panel had to conform, and which is quite different from the old standard established by the common law. The national health service will involve another new and much higher standard of service on the part of doctors and other practitioners who participate in it. Unemployment insurance requires the formulation of standards in regard to availability and capacity for work; the circumstances which justify an employee voluntarily leaving his job; the conditions which must be taken into account in deciding whether a situation is suitable, and many other matters. Town and country planning involves new and complex standards in regard to zoning for specific uses, amenities, location of industry, housing and a whole series of questions. The provisions intended to protect buildings of 'special architectural or historic interest' imply a new standard. The Education Act, 1944, requires for the first time independent schools to possess suitable premises containing adequate accommodation and to provide efficient and suitable instruction: all these terms express the legislative intention to evolve new standards in the sphere of education. The National Service Acts

<sup>7</sup> Henry L. McClintock, 'Public Land Controversies', *Minnesota Law Review*, Vol. 9, No. 7, pp. 1055-1056.

imply that standards of exceptional hardship will be formulated and applied. And so on through most of the fields into which administrative justice has spread.

The professional associations representing doctors taking health insurance work have failed to recognise the emergence of an entirely new standard of service, and the evolution of a change in the relationship between patient and practitioner. This failure made the evidence which those bodies gave before the Royal Commission on Health Insurance appear to be narrowly preoccupied with the interests of the profession, and oblivious to the wider social interests of the community. The witnesses on behalf of the British Medical Association solemnly asserted that the standards of treatment and attention required from practitioners who are annually receiving large capitation fees derived from State contributions and compulsory payments levied on workers and employers would be adequately assured by the right of the insured contributor to change his doctor if he were dissatisfied.<sup>8</sup> The Medical Practitioners' Union was unable to see why the Minister should claim to exact 'a higher standard of treatment than is called for in the ordinary courts' in private practice cases; and regarded the Minister's attempt to penalise doctors for negligence or incompetence, especially in cases where no action for damages would lie under the old common law tradition, as demonstrating not so much 'deliberate illegality' on his part as 'unfitness for the exercise of judicial functions'.<sup>9</sup> Both bodies put forward proposals which would in effect have thrown the entire machinery for adjudicating upon complaints against doctors into the hands of the medical

<sup>8</sup> Royal Commission on National Health Insurance, Appendix to Minutes of Evidence, Part III, p. 449, para. 37.

<sup>9</sup> Royal Commission on National Health Insurance, Appendix to Minutes of Evidence, Part III, p. 473.



profession, with results which can easily be imagined.<sup>1</sup> The then Minister of Health stoutly resisted these and subsequent proposals. For both he and the Royal Commission concurred in holding it to be inconsistent with the fundamental principles of the health insurance scheme that questions regarding medical treatment arising between a panel doctor and an insured person should be 'regarded as a purely private matter to be dealt with in precisely the same way as when they arise between a private practitioner and a private patient'.<sup>2</sup>

In the recent negotiations between the British Medical Association and the Minister of Health concerning the national health service it was evident that the Association adheres tenaciously to its narrow-minded and selfish conceptions of the interests of the medical profession which have characterised its attitude in the past. On this occasion, however, its efforts to ensure that control of the machinery of adjudication rests in the hands of the medical profession, where complaints against doctors are concerned, have met with somewhat greater success. For, as we have seen, the tribunal which has been set up to act as a court of first instance in cases of this kind will include, among its three members, a person appointed after consultation with the organisation's representative of the profession.<sup>3</sup> The Minister of Health will, it is true, have the last word where the tribunal comes to an adverse conclusion and directs that the practitioner shall be excluded from further participation in the service, since an appeal lies to the Minister in such circumstances. But it is something to have a voice in the first word on the subject.

The King's judges had for centuries laid down

<sup>1</sup> In subsequent correspondence with the Minister of Health the British Medical Association suggested alternatively an appeal to the courts. See *British Medical Journal Supplement*, October 16, 1926, p. 178.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ante*, pp. 132-3.

standards of honest conduct and straightforward dealing between man and man in regard to such matters as the sale of goods, the administration of a trust, the duty owed by a professional man to his client, the good faith required in making a policy of insurance, and so forth. But affairs of this kind, transactions of an essentially private nature, were far removed from the spheres of activity in which standards of conduct and achievement were now required, in the social interest, in order that national minima of health, education, housing, sanitation, protection against loss of work, and so forth might be assured, and their observation required from the entire community.

The Royal Sanitary Commission of 1871, speaking of the control by the central department over the local boards of health and other authorities in sanitary matters, reported that the existing legal remedy of mandamus was not adequate. The process is long and dilatory, and the case, 'when at last brought to issue, would be of a nature which a court of law is eminently unfitted to try. Details of sewers and sewage; quantity and quality of water supplied; character and volume of water within reach; capacity of works to be constructed, their nature and general arrangement; state of domestic offices; mode in which scavenging is done and removal of refuse carried on: these and similar questions would be the points for discussion, and the mere statement would appear to afford sufficient proof that they cannot with any satisfactory result become the subject of judicial decision'.<sup>4</sup> The commission recommended accordingly, after discussing alternative methods, that the central authority should have full power to make a conclusive order binding on the local authority and enforceable in the courts.<sup>5</sup>

✓For the task of hammering out new standards in fields

<sup>4</sup> Royal Sanitary Commission, Second Report, 1871, c. 281, p. 37.

<sup>5</sup> *Ibid*

such as these the courts of law would doubtless have been among the first to acknowledge their own manifest unsuitability.<sup>6</sup> Even where standards have been evolved by the courts, they have sometimes shown a tendency to crystallise into rules; and much of the equitable jurisdiction of the Court of Chancery, which originally consisted of the discretionary application of moral standards, has hardened into doctrines which are in practice sometimes as inflexible as the most rigid rules of the common law.

Yet greater reliance upon standards and less reliance upon rules marks the transformation which is taking place in society, from a condition in which contract and property were of supreme importance, to one in which the administration of services in the public interest is of at least equal importance<sup>7</sup>; and one of the causes of the growth of administrative law, both in England and in the United States, has been the need for evolving new standards in untrodden fields of legal and administrative activity. The ordinary courts of law are more suitable for determining a dispute where each party claims something definite, than for deciding those in which a standard of service or attainment has to be determined and enforced in the public interest. For the setting up of standards of this kind often requires expert knowledge and special experience in a particular field. The question whether a local authority is justified in restricting traffic in excess of a certain weight from crossing a particular bridge<sup>8</sup> is an engineering problem: a right decision demands the application of rules which only engineers understand, and that capacity for sound judgment which is acquired only by long experience of similar problems. In other fields of social control the creation of standards requires

<sup>6</sup> *Crocker v. Plymouth Corporation*, [1906] 1 K.B. 491. See p. 288, *ante*.

<sup>7</sup> Cf. Roscoe Pound, 'The Administrative Application of Legal Standards',

44 *American Bar Association Reports*, p. 446.

<sup>8</sup> Ministry of Transport Act, 1919, s. 11.

a technical knowledge of education, medicine, sanitary engineering, thermo-dynamics, and other subjects which lie outside the ken of most lawyers. In America the need for tribunals capable of applying standards of conduct in specialised fields has led to the modern development of administrative law<sup>9</sup>; and the same is true to no small extent of England.

Sir Cecil Carr rightly observes that in considering what sort of tribunal is required, one must have regard to the subject awaiting decision. But I find it difficult to agree with him when he says that 'No issue is too technical for a court'.<sup>1</sup> We have already seen that the technical problems involved in patent law, for example, are beyond the capacity of judges trained only in law and the humanities, and require a knowledge of science and technology for their efficient determination.<sup>2</sup> The same is true of many other branches of law and administration. It may be true, as Sir Cecil Carr says, that whether a dwelling is or is not reasonably fit for human habitation is a question which a jury is competent to decide because it involves 'the standard of ordinary reasonable men'.<sup>3</sup> But judges and juries are not competent to pronounce on whether drainage systems, or the rate structures of railways, or the physical abilities of motor drivers, or the restrictions placed on the use of bridges, or the means used to render harmless poisonous matter flowing into a river, or the conditions attached to a licence for an explosive factory, or the method of charging for gas supplies, are 'reasonably fit' for their purpose, because the subject-matter lies outside the scope

<sup>9</sup> Gerrard Henderson, *The Federal Trade Commission*, pp. 95-98; J. Landis, *The Administrative Process*, *passim*; F. F. Blachly and M. E. Oatman, *Administrative Legislation and Adjudication*, pp. 204-205.

<sup>1</sup> *Concerning English Administrative Law*, pp. 101-102.

<sup>2</sup> *Ante*, pp. 420-5.

<sup>3</sup> Carr, *loc. cit.*

of their knowledge or experience and requires special qualifications for a proper understanding.

The creation of new standards in unexplored fields has, however, demanded something more than mere technical knowledge. It has required, in the second place, an infusion of certain moral ideas which have hitherto exerted but a small influence on the course of litigation in the courts of law. Many of the judicial powers of the administrative departments of State refer to matters which are prosaic enough in all faith: drains and sewers, contaminated wells and polluted streams, cesspools and nuisances, gas and water. The significant fact is that the powers of adjudication are to be exercised, not with the object of enforcing individual rights, but with the purpose of furthering a policy of social improvement, such as the promotion of the public health, the securing of better housing conditions, or the mitigation of distress from unemployment. Hence it is that new moral conceptions have been called for in the adjudication of disputes; and it is this need which, almost unconsciously, has led to the formation of administrative tribunals. Periods of liberalisation of the law have always involved for a time a movement away from law, a temporary reversion to what has been called 'justice without law', in which discretionary power is looked upon complacently since it is taken to be the sole means of escape from the bonds imposed by strict law.<sup>4</sup> In America the infusion of new moral conceptions and of ideas developed in the social sciences has produced a tendency away from the ordinary courts which has proceeded much further than in England. It has led to the creation, not merely of administrative tribunals for handling special problems,<sup>5</sup> such as the determination of 'reasonable' rates and service from

<sup>4</sup> Roscoe Pound, *The Spirit of the Common Law*, p. 72.

<sup>5</sup> J. Landis, *The Administrative Process*; R. E. Cushman, *The Independent Regulatory Commissions*, *passim*.

utility undertakings, the conduct to be observed in issuing and dealing with securities, the amount to be awarded for workmen's compensation, standards of fair trading, and so forth, but also of juvenile courts, domestic relations courts and municipal courts, which all adopt the methods of executive justice rather than of judicial justice, and proceed more by the application of 'a trained intuition' to the facts of a particular case than by articulate reasoning along legal lines.<sup>6</sup>

#### THE ADVANTAGES OF ADMINISTRATIVE TRIBUNALS

We have observed above that the main reason for the recent growth of administrative law in England is the great extension in the functions of government which has taken place during the present century, and the need for providing tribunals which would be free to determine controversies arising in connection with the new social services with more regard for modern conceptions of social obligation than for the strict enforcement of individual legal rights; which would create standards of conduct and attainment in regions previously unchartered by the law; and which would dispose of their business more rapidly and cheaply than the ordinary courts of law. We may now ask what are the advantages and disadvantages possessed by such tribunals. Do they work as effectively in their own sphere as the courts of law? Have they fulfilled the purposes for which they were created?

To start with the advantages, it may be said at the outset that administrative justice is immensely cheaper than the machinery of the courts. I have not been able to obtain exact figures as to costs, and, in any case, it would be difficult to draw comparisons between dissimilar jurisdictions, but it can be said without hesitation that administrative tribunals provide a far cheaper method of

<sup>6</sup> 'Rule and Discretion in the Administration of Justice', 33 *Harvard Law Review*, p. 973.

adjudication than the courts of law. By cheaper I mean less expensive to the parties concerned in the controversy. It is impossible to ascertain, without much more elaborate costing details than at present exist, what part of the expense involved in maintaining a great public department out of the revenue is incurred by the discharge of judicial functions by civil servants who are devoting some or most of their time to the performance of executive duties. But there can be no doubt, having regard to the relative salary scales, accommodation and equipment, that administrative tribunals in England are cheaper than the courts of law, not only to the parties, but also from the point of view of total cost. In any event, what we are concerned with here is cost to the litigant, claimant or applicant, and that must obviously be far less where there are normally no court fees to pay, no solicitors to instruct, no counsel to brief, no pleadings to print, no affidavits to swear. In claims for unemployment benefit before the Umpire and Court of Referees, for example, an insured contributor is put to no expense beyond his own out-of-pocket expenses in attending the court, and the cost of bringing witnesses to support his claim (other than the full-time salaried officials of trade unions) is paid by the Treasury. The administrative tribunals which decide claims or appeals to all the various national insurance benefits are virtually free to those who use them. In the United States, as in England, administrative tribunals have been found cheaper to the litigant than the formal law courts.<sup>7</sup> This is a matter of importance, when litigation is as fantastically expensive as it is in England, and particularly where such measures as the National Insurance schemes make it

<sup>7</sup> Cf. W. H. Pillsbury, 'Administrative Tribunals', 36 *Harvard Law Review*, p. 407; H. L. McClintock, 'Public Land Controversies', 9 *Minnesota Law Review*, p. 649.

essential that no insured person should be deterred by expense from asserting his rights.<sup>8</sup>

Rapidity is another advantage possessed by most administrative tribunals as compared with the judicial courts. The freedom which enables a Government department or tribunal to dispense with an oral hearing, to abandon the intricate procedure which attends pleading and trial in an action at law, to waive the elaborate rules as to the proof of facts and admissibility and relevance of evidence, which are rightly insisted upon in a court of law, results normally in an immense saving of time in the determination of controversies. Where very large numbers of contested claims are involved, as in the sphere of national insurance or pensions appeals, or under the National Service Acts during the war, the volume of work is so large that the ordinary courts could not possibly deal with it in addition to their normal business, even if it were desirable that they should do so on other grounds. Where tens of thousands of cases have to be decided each month, which has frequently happened under the Unemployment Insurance scheme, it is necessary not only to have a specialised ad hoc tribunal, but also to ensure that its procedure is more rapid than that which is normally found in even the inferior courts.

Occasionally, however, an administrative tribunal fails to provide a quick method of adjudication. A former town clerk of Birmingham, referring to appeals to the Ministry of Health against closing and demolition orders made by a local authority under the Housing Acts, remarked that his experience of the inquiries held by an

<sup>8</sup> Dr. C. K. Allen suggests that it is 'a very open question' whether in cases such as claims to widows' and old age pensions, greater economy would not be effected in the long run by using the ordinary legal procedure of the courts and leaving claimants free to obtain legal advice (*Law and Orders*, p. 153). After many years of practical experience of administrative tribunals, I can say without hesitation that Dr. Allen is entirely wrong on this point.



inspector of the Ministry which follow such an appeal is 'that many matters of trivial importance are introduced and the proceedings generally are of an unnecessarily lengthy character'.<sup>9</sup> The professional associations representing the panel doctors have complained of the delay occasioned by the Ministry of Health in deciding on complaints against practitioners.<sup>1</sup> But these are exceptions to the general experience, and in the former instance were largely due to the unsatisfactory qualifications of the inspectors of the Ministry of Health, who at that time were not properly fitted for the discharge of judicial functions. On the whole, administrative tribunals have everywhere been able, both in England and in America, to dispose of their business more rapidly than the courts of law, mainly because their procedure is less complicated.<sup>2</sup> Moreover, the members of such tribunals are usually familiar with the subject-matter of the question in issue, whereas much time may be spent in a court instructing the judge in the technicalities of the matter.

The desire to obtain rapid methods of adjudication has, indeed, as I have already pointed out, been one of the secondary causes which has led to the growth of administrative law in England.<sup>3</sup> Efficient public administration is essential in the provision of modern social services, and one of the conditions of efficiency is that controversies arising out of the conduct of such services shall be determined, if not with the arbitrary and often irresponsible swiftness of a private employer, at any rate not with

<sup>9</sup> F. H. C. Wiltshire, 'Appellate Jurisdiction of Central Government Departments', *Journal of Public Administration*, Vol. 2, No. 4.

<sup>1</sup> Royal Commission on National Health Insurance, Minutes of Evidence, Appendix, Part III, p. 471.

<sup>2</sup> W. H. Pillsbury, *loc. cit.*; H. L. McClintock, *loc. cit.*

<sup>3</sup> This again is true of the United States: cf. Pillsbury, *op. cit.* 'The last twenty years have seen a marked increase in administrative courts, notably with respect to public utility, trade, workmen's compensation and labor boards or commissions. These boards have been created in response to a public demand for increased efficiency of government and to meet special needs, and are in the main satisfactorily accomplishing the objects for which they were created'.

the cumbersome slowness of a court of law. Even the late Professor Dicey, who deplored the transference of authority from the judiciary to the executive, which he thought 'saps the foundation of that rule of law which has been for generations a leading feature of the English constitution', was compelled to admit that when the State undertakes the management of types of business which previously have been carried on by each individual citizen simply with a view to his own interest, the government will be found to need 'that freedom of action necessarily possessed by every private person in the management of his own personal concerns'. If a man of business, he said, were to attempt to conduct his affairs in accordance with the rules which quite properly guide our judges, he would be bankrupt at the end of a year. How, asked Dicey, could any trade prosper if it were in the hands of a man who could not dismiss a clerk until conclusive proof of fraud or misconduct was obtained, or if no evidence were allowed unless it were what lawyers call 'best evidence'? The management of a business, he observed, is not the same thing as the conduct of a trial, and the two things must be governed by totally different rules.<sup>4</sup> The spheres of action in which administrative tribunals have been set up are, in nearly all cases, those in which the State, either through the central government or the local authorities, has 'gone into business': in public health, in education, in housing, in town and country planning. The connection between rapidity of adjudication and efficiency of administration is, as Dicey points out, a very close one.

One very important advantage possessed by administrative tribunals is the fact that they can be manned by individuals possessing special experience or training in particular fields. Law has its own technique, and it is a very valuable one. But there are many classes of cases in

<sup>4</sup> A. V. Dicey, 'The Development of Administrative Law in England', 31 *Law Quarterly Review*, p. 148.

which specialised knowledge of other kinds is required in order that a good decision may be arrived at.<sup>5</sup> The High Court of Justice is to some extent divided into specialised compartments; certain judges take admiralty, divorce and probate cases, others deal with the commercial list and the revenue appeals. Nautical assessors assist the judge in shipping disputes,<sup>6</sup> and expert witnesses are called in cases where scientific or artistic matters are in issue.

But these arrangements do not cover the ground over which the functions of government now extend. The movement towards the specialisation of the ordinary courts appears to have stopped, and no development in this direction has taken place for many years. Moreover, expert witnesses are only too often hired assassins of the truth; and even if they were 'just men made perfect', the assimilation of technical facts at short notice, through the testimony of another individual, is a different thing from a first-hand knowledge of the groundwork based on personal experience or training. But, in any case, a court of law is in practice dependent for its facts on the evidence furnished by the parties to the dispute, and no matter how inadequate that evidence may be, the court cannot travel outside it, except in regard to a few matters of common knowledge of which 'judicial notice' may be taken.<sup>7</sup>

<sup>5</sup> The question of establishing special Tribunals of Commerce has often been discussed in England. See, for example, the Reports of the Select Committee of the House of Commons on Tribunals of Commerce of 1858. The question of setting up bodies possessing judicial powers and presided over by commercial men was added to the terms of reference of the Royal Commission on the Reform of the Courts of Law of 1867. The Commission reported adversely to the suggestion, but recommended that the judge in commercial cases might be assisted by two skilled assessors to advise on technical matter of business. Cf. *Life and Correspondence of Rt. Hon. Hugh Childers*, by Lieut.-Colonel Spencer Childers, Vol. 1, p. 148.

<sup>6</sup> *The Banshee* (1887), 56 L.T. 725.

<sup>7</sup> 'The test of the judicial process, traditionally, is not the fair disposition of the controversy; it is the fair disposition of the controversy *upon the record made by the parties*. True, these are collateral sources of information which often affect judicial determinations. . . . But, in strictness, the judge must not know of the events of the controversy except as these have been presented to him, in due form, by the parties', J. M. Landis, *The Judicial Process*, p. 38.

Even in a petition for divorce the judge cannot ask the petitioner whether he or she has anything to reveal which the court ought to know, although concealment of a matrimonial offence may be fatal to the petitioner's cause if the King's Proctor intervenes. 'It is a misfortune', said Mr. Justice Hill in commenting on the 'unsatisfactory condition' of the law in this respect.<sup>8</sup> A court of law has, therefore, but few facilities for acquiring on its own behalf information of social facts<sup>9</sup>; and even if the judge possesses great personal knowledge of a particular subject, he is not supposed to consider facts which are not proved in evidence. In the United States there is apparently a greater latitude permitted in this respect than in England. We find, for example, that the judicial opinions of the late Mr. Justice Brandeis, of the Supreme Federal Court, are 'replete with references to the contemporary conditions, social, industrial and political, of the community affected'.<sup>1</sup> A study of these opinions, said Judge Cardozo, is an impressive lesson in the capacity of the law to refresh itself from extrinsic courses, and thus vitalise its growth.<sup>2</sup> But this ability on the part of courts of law to obtain outside information on social phenomena is extremely rare even in America; and there is a distinct movement in the States to establish what are called 'fact-finding' bodies, which has arisen partly from the inadequacy of the ordinary courts to investigate or assess difficult social questions in regard to which ordinary witnesses called by the parties do not suffice to reveal the whole story. The Committee on Ministers' Powers suggested that in certain circumstances the facts should be found by an independent tribunal and the decision on policy made by the Minister.

<sup>8</sup> *Sutton v. Sutton (King's Proctor showing cause)*, The Times newspaper, March 8, 1927.

<sup>9</sup> Cf. Roscoe Pound, *The Spirit of the Common Law*, pp. 214-215.

<sup>1</sup> *Truax v. Corrigan*, 257 U.S. 312; *Adams v. Tanner*, 244 U.S. 590, 600; B. J. Cardozo, *The Growth of the Law*, p. 117.

<sup>2</sup> *Ibid.*

‘ But ’, as Sir Cecil Carr observes, ‘ the administrators will protest, it is all one process.’<sup>3</sup>

‘ The test of the judicial process ’, writes Mr. Landis, former Dean of the Harvard Law School, ‘ traditionally is not the fair disposition of the controversy ; it is the fair disposition of the controversy *upon the record as made by the parties.*’ Hence, although there are a few collateral sources of information open to the court which may affect the decision, these are of minor importance and, strictly speaking, the judge ‘ must not know of the events of the controversy except as these may have been presented to him, in due form, by the parties ’. He may not conduct an investigation to determine what policy is best suited to the subject-matter under consideration, even though he is faced with the necessity, through his obligation to decide the issue, of applying a policy. It is not even part of his judicial function to bring to the attention of other departments of government the shortcomings of the law which he is bound to administer.<sup>4</sup>

These limitations and restrictions usually do not apply to administrative tribunals. Their main purpose is to decide the controversies which come before them as ‘ rightly ’ as possible, independently of the formal record the parties themselves produce. Although, of course, they must pay due and proper regard to the evidence, they may, if they wish, travel outside it to other relevant sources of knowledge. The ultimate test of administrative justice, Dr. Landis declares, is the policy that it formulates rather than the fairness, as between the parties, of the disposition of a controversy on a record of their own making.<sup>5</sup> The great administrative tribunals of the United States, such as the Interstate Commerce Commission, the Securities and Exchange Commission and the

<sup>3</sup> *Concerning English Administrative Law*, p. 105.

<sup>4</sup> *The Administrative Process*, p. 38.

<sup>5</sup> *Ibid.* p. 39.

Federal Trade Commission, are investigating bodies in their own right. This applies not only to the settlement of particular issues, but also to the inquiries which are necessary to formulate a wise policy.<sup>6</sup>

We have already seen, on this side of the Atlantic, the Minister of Transport first seeking the advice of a departmental committee on the problems arising in connection with the facilities to be accorded to long-distance motor coach services in the London area; and later applying the policy recommended by that committee to the appeals which come before him in the exercise of his judicial powers.<sup>7</sup> We have even seen the High Court judicially applaud the Minister's action in so doing. We may also recall in this connection the elaborate directions given by Parliament in the Road Traffic Acts to the Area Traffic Commissioners as to the policy they are to work out and apply in carrying out their judicial functions.<sup>8</sup>

To formulate a policy which will produce the maximum advantage in a complex field of public administration requires certain attributes which are not normally found in the ordinary courts. It requires, first, a degree of expert knowledge of the subject-matter not commonly found among lawyers especially conversant with 'the majestic authority of textbooks and cases'.<sup>9</sup> It requires, secondly, an opportunity for the tribunal to maintain 'a long-term, uninterrupted interest in a relatively narrow and carefully defined area of economic and social activity',<sup>1</sup> rather than a general jurisdiction which calls upon a court to resolve an infinite variety of matters in many different fields. This breadth of jurisdiction and freedom of disposition, observes Mr. Landis, 'tends somewhat to

<sup>6</sup> *Ibid.* p. 40-41.

<sup>7</sup> *Ante*, pp. 298-9.

<sup>8</sup> *Ante*, p. 98.

<sup>9</sup> Landis, *op. cit.* p. 33.

<sup>1</sup> *Ibid.* p. 30.

make judges jacks-of-all-trades and masters of none'.<sup>2</sup> To say, as Dr. Allen does, that 'the judge is simply not concerned with government; he is concerned with the administration of justice',<sup>3</sup> is to substitute a mere incantation for the processes of thought. We must not burke the issue by such means.

Administrative law enables men possessing special knowledge to judge the case, or at least to assist in the business of adjudication. The tribunals which advised the Minister of Health in regard to complaints made against panel doctors under the old Health Insurance scheme consist of medical practitioners as well as lawyers, and the same principle has been adopted with a greater degree of finality in the new National Health Service Act. The representative members of the Courts of Referees which hear claims for unemployment benefit consist usually of employers and workers or trade union officials, and their practical experience on such questions as trade usage, misconduct and what constitutes a suitable situation is of great value and makes the decision of the tribunal far more convincing and authoritative than it would otherwise be. Controversies under the Merchant Shipping Acts are decided by Marine Superintendents employed by the Minister of Transport, officials who have usually had a long experience of the merchant service. Public inquiries held by the Ministry of Health under the Public Health Acts are usually conducted by sanitary and civil engineering inspectors. The London Building Tribunal includes an architect and a surveyor among its members. Many other examples of a similar kind could be given. The great independent regulatory commissions in the United States which act as administrative tribunals have at their disposal large staffs of economists, accountants

<sup>2</sup> *Ibid.* p. 31.

<sup>3</sup> C. K. Allen, *Law and Orders*, p. 171.

and specialists in various fields, in addition to a corps of lawyers.<sup>4</sup>

In some cases the need for specialised knowledge has been so great that the judicature has itself asked for an administrative tribunal to be established. An interesting example of this is provided by the history of the railway control courts.<sup>5</sup> The Railway and Canal Traffic Act (1854) originally provided that where a complaint against a railway company as to service or rates was made out to the satisfaction of the High Court, the Court should remit the case to the Board of Trade, which, through its executive officers, should propose a scheme for the better arrangement of the traffic and for the removal of the grievance. The scheme would then be subject to the approval and enforcement of the Court. Through the influence of the railway companies,<sup>6</sup> all reference to the Board of Trade was struck out of the Bill, and the sole provisions made was for proceedings in court before a judge, assisted if necessary by an engineer or barrister. The court or judge could, on complaint, direct and prosecute by such mode and by such barristers, engineers and other persons, all such inquiries as it thought proper to form a just judgment on the complaint.

Lord Campbell, who was then Lord Chief Justice and later Lord Chancellor, said in his speech on the Bill when it reached the committee stage in the House of Lords, that it contained a code which the judges could not interpret. The Bill sought to turn the judges into railway

<sup>4</sup> Many other tribunals in the United States are both investigating bodies and courts, any may employ engineers and experts of their own to inquire and report in pending cases. Cf. H. J. Laski, *Grammar of Politics*, p. 393: 'The findings of an expert commission have a validity to which no judicial examination can pretend; the decision, for example, of the New York Public Service Commission that a gas company ought to provide gas service for a given district is almost inevitably more right than a decision pronounced by the courts in a similar case'.

<sup>5</sup> See Chap. 3, pp. 87-96.

<sup>6</sup> Report of Joint Select Committee on Railway Companies Amalgamation, 1872, Parliamentary Papers, Vol. 13, Reports from Committees.



directors. No rule was laid down which they were to enforce. The essence of the measure was to be found in the section which said that the railway companies ought to act honestly; and the common law judges were to be called upon to say whether they had done so or not. But, he continued, they had no statutory or other legal authority to which they could refer, and no precedents to guide them. Thus, in order to be able to discharge their new functions 'they must go as apprentices to civil engineers, and travel upon the railways, in order to acquire some knowledge of engineering and of the manner in which these railways were conducted'. The judges, he added, would have to decide whether trains had started too late, whether there was a sufficiency of carriages, whether the staff was adequate; and they would, in consequence, be 'called upon to answer questions of fact, upon which they must be wholly incompetent to form an opinion'.<sup>7</sup>

In a later speech he again returned to the charge. The Bill left the judges without guidance as to how to exercise their discretion as to what was reasonable. They were, besides, 'to form a just judgment on all matters of complaint relating to railway management that might come before them, and they were to lay down a code of regulations for the government of railway companies'. The judges, he continued, and himself among them,<sup>8</sup> felt themselves incompetent to decide on these matters. He had spent a great part of his life in studying the law, but he confessed he was wholly unacquainted with railway management. . . . He knew not how to determine what was a reasonable fare, what was undue delay, or within what time trucks or boats should be returned. 'They

<sup>7</sup> Parliamentary Debates, Third Series, Vol. 133, 1851, May to June, col. 596.

<sup>8</sup> Chief Justice Jervis, alone of all the judges, disagreed. In a letter to Lord Stanley, who read it to the House of Lords, he said that the judges could certainly administer the Act 'if they will take the trouble to work it' (Parliamentary Debates, Vol. 133).

should have a lay tribunal for the decision of questions of the nature contemplated by the Bill, and not one composed of the judges.'<sup>9</sup>

But Parliament preferred to listen to the interested demands of the railway companies rather than to the self-confessed limitations of the judges, with the result that a Joint Select Committee of 1872 found that the legislation in question had been practically inoperative, for the reasons anticipated by Lord Campbell.<sup>1</sup> The functions committed to the common pleas, said the committee, 'are so foreign to the ordinary functions of a court of justice that it is no wonder that this portion of the Act should have failed to work'. As a consequence, jurisdiction under the Act of 1854 was, in the following year, transferred to Railway Commissioners appointed under the Regulation of Railways Act, 1873, and in 1888 it was again transferred to the Railway and Canal Commission. In both cases one of the commissioners was required to be a person 'of experience in railway business'.<sup>2</sup>

Where judicial functions are conferred on a large department such as the Ministry of Health, not only can the decision be made by officers who possess special qualifications for dealing with particular classes of cases, but those officers can avail themselves of all the information relating to the subject which has accumulated in the department. This pooling of knowledge, which may be organised to a high degree of perfection by means of a good system of records, contrasts strongly with the essential separatism of the courts of law, where a fixed body of law prevails over a series of unco-ordinated sets of facts. Where it is desirable to establish a single standard of attainment or service over a given area, or

<sup>9</sup> *Ibid.* cols. 1136-1137.

<sup>1</sup> Report of the Joint Select Committee, *supra*, p. lxviii.

<sup>2</sup> Cf. Chapter 3 for a fuller description of the structure and functions of the Railway Courts.

throughout the country, as in the case of public health and sanitation, the possibility of co-ordinating decisions, which depends on the centralised collation and pooling of information, is a great advantage possessed by administrative tribunals over the courts of law. The judicial enforcement of national minima is more likely to be secured by administrative tribunals than by courts of law, except where rigid and minute rules are laid down by statute.

The contrast drawn here is in essence the difference between unity and diversity of decision. In practice, this tends to resolve itself into the difference between choosing the courts of law as the adjudicating organs or handing the task to an administrative tribunal of one sort or another. Sir Maurice Gwyer, in his evidence before the Committee on Ministers' Powers, drew attention to the impossibility of obtaining a uniform and co-ordinated body of decisions from the county courts and magistrates' courts which exercise only a local jurisdiction. 'Oddly enough', he remarked, 'one of the criticisms against departmental tribunals has been their lack of co-ordination, whereas, in fact, the truth is exactly the opposite.'<sup>3</sup> Sir Cecil Carr emphasises the same point when he says that legal chairmen of the county court judge type, though of high professional reputation and independent outlook, are unable to produce a consistent body of decisions. County court judges were appointed to preside over tribunals entrusted with the classification of aliens in Britain soon after the outbreak of war in 1939. Some of these tribunals classified aliens mostly in class B, others mostly in class C. 'They were impartial; they were not uniform. This human diversity must be reckoned with where classification is separately undertaken in a new field.'<sup>4</sup>

One further advantage possessed by administrative

<sup>3</sup> Minutes of Evidence, Vol. 2, p. 16, s. 5.

<sup>4</sup> *Concerning English Administrative Law*, p. 101.

tribunals lies in the greater flexibility with which they are able to discharge their functions. In strict law such tribunals are not bound either by their own past decisions or by the decisions of any other authority. Administrative tribunals in practice very often adhere to precedent as closely as the courts, and some sense of continuity is absolutely necessary for the creation of that consistency which lies at the bottom of all law and all order. But it is nevertheless a distinct advantage for a tribunal to be able to break clean away from a previous ruling which is known to have worked out badly, or where a better conclusion is now available in the light of subsequent knowledge. In several instances the administrative tribunal is given statutory authority to revise its own decisions on new facts being brought to light, and the doctrine of *res judicata* does not apply.<sup>5</sup> The greater flexibility of administrative tribunals as compared with courts of law is indeed an inherent characteristic of administrative law during the period of its growth. For administrative law is law in the making; and law in the making is naturally less rigid than the law which is already made and administered in the formal courts.

But more important than flexibility in this sense is the fact that an administrative tribunal can enforce a policy unhampered by rules of law and judicial precedents.<sup>6</sup> It can never be forced into the situation in which judges are sometimes placed, when they confess themselves compelled by law to decide in favour of one party, who claims redress as of right, when on the merits of the case they would prefer to decide in the opposite sense. Of all

<sup>5</sup> Unemployment Insurance Act, 1935, s. 46; National Insurance Act, 1946, s. 43 (5) (b).

<sup>6</sup> Mr. Landis emphasises a similar need in the United States when he writes: 'If such qualities as flexibility and expertness are demanded in the field of rule-making, the intensity of that demand is no less in the area of adjudication. To place adjudication outside the administrative process would tend to threaten the carrying through of those policies whose formulation was so deliberately given to the administrative', *The Administrative Process*, p. 98.

the characteristics of administrative law, none is more advantageous, when rightly used for the public good, than the power of the tribunal to decide the cases coming before it with the avowed object of furthering a policy of social improvement in some particular field; and of adapting their attitude towards the controversy so as to fit the needs of that policy.

#### THE DISADVANTAGES OF ADMINISTRATIVE TRIBUNALS

The advantages of administrative tribunals are, we have observed, the cheapness and speed with which they usually work; the technical knowledge and experience which they make available for the discharge of judicial functions in special fields; the assistance which they lend to the efficient conduct of public administration; and the ability they possess to lay down new standards and to promote a policy of social improvement.

But these tribunals, like other human institutions, have defects as well as merits; and we shall now endeavour to indicate some of the more obvious disadvantages of administrative justice as it exists in England at the present time. Many of these drawbacks are not inevitable or inherent in the very nature of administrative law, but could without difficulty be remedied.

One great disadvantage is the lack of publicity which attends the work of administrative tribunals. In the exercise of judicial functions by great departments such as the Ministry of Health and the Ministry of Education, there is usually no oral hearing, though each side must of course have an opportunity of stating its case in writing; and even where there is a hearing it is not open to the public. The rules of procedure laid down for the Courts of Referees on Unemployment Insurance specifically exclude both the general public and the press from being present. Reports of decided cases are seldom published, except by a few tribunals, such as the Umpire in regard

to claims for unemployment benefit and decisions under the National Service Acts. Even when decisions are published, they are widely scattered in obscure documents which may easily escape the knowledge of persons or interests affected. Nor are the reasons for the decisions disclosed, save in a few instances.

These are real disadvantages. Without publicity it is impossible to predict the trend of future decisions, and an atmosphere of autocratic bureaucracy is introduced by the maintenance of a secrecy which in the ordinary course of events is quite unnecessary. There is no inherent reason why these disadvantages should attach to administrative justice. There can be no objection to permitting the public to attend hearings when they are given or to requiring all administrative agencies which perform judicial functions to publish reports of their decisions, at regular intervals, giving reasoned arguments for the conclusions. The public could without difficulty be made to understand that the reported cases were not to be regarded as immutable precedents to be followed inflexibly on all future occasions, but taken merely as indications of the direction in which the mind of the tribunal was moving—a direction which would be subject to change if circumstances so demanded. In this way it would be possible to obtain a body of informed criticism on the work of the tribunal which would have a beneficial effect not only on those sections of the public coming under its jurisdiction, but also on the tribunal itself.

Scarcely any improvement in the practice of administrative tribunals in regard to the publication of reports and the obligation to give reasoned decisions has taken place since I drew attention to the matter in the first edition of this book in 1928, despite frequent subsequent criticism from many quarters and recommendations on the subject by the Committee on Ministers' Powers.<sup>7</sup> There is

<sup>7</sup> Report, p. 116.

in general an increasing tendency on the part of government departments to cloak their activities, however harmless or beneficial, in a thick mist of secrecy, and this general inclination has helped to encourage unnecessary mystery-mongering on the part of administrative tribunals.

The Tribunals for Conscientious Objectors which were set up under the National Service Acts during the recent war normally sat in public, and the press and interested persons could attend the meetings. But, as Mr. Pollard points out, one of the defects of these tribunals was their failure to give reasoned judgments, publish precedents and observe uniform standards. The local tribunals sometimes furnished applicants with only a brief and inadequate note of the reasons for their decisions, and such notes are 'too short to be much help to the applicant, and they are not reasoned judgments'.<sup>8</sup> The Appellate Tribunal, which should have exercised a guiding hand over the whole body of local tribunals, did not trouble even to provide short notes of its decisions, but merely sent the appellant a bare announcement of the result of his appeal. In five years of continuous work, only eleven reasoned decisions are known to have emerged from the Appellate Tribunal, and these were confidentially circulated to the local tribunals but were not published officially. These documents apparently received such confidential treatment that even members of the tribunals were not always aware of their contents, so that different tribunals were giving inconsistent decisions on such a vital question as whether a British subject with Italian parents could be regarded as having a valid conscientious objection to fighting in the war on the side of the Allies.<sup>9</sup> In these circumstances it is not surprising that a high degree of discrepancy resulted from the work of the

<sup>8</sup> R. S. W. Pollard, 'Tribunals for Conscientious Objectors and Administrative Law', 22 *Public Administration*, pp. 98-99.

<sup>9</sup> *Ibid.* pp. 99, 102.

Conscientious Objectors' Tribunals despite many excellent features which they possessed in other respects.

There are signs, however, that Parliament is beginning to be aware of the desirability of imposing a duty on administrative tribunals to afford publicity to their proceedings and to publish reasoned decisions. The Minister of Transport, in hearing appeals under the Restriction of Ribbon Development Act, 1935, is required not only to publish a summary of the facts which he finds, but also of the reasons for his decision.<sup>1</sup> Under the recent Health Service Act the Minister of Health must provide by regulations for the publication of the decisions of the special tribunal which is to hear complaints against medical practitioners.<sup>2</sup> These are only straws in the wind, but they are blowing in the right direction. One would like to see a strong Parliamentary gale sweep away the refusal of many administrative tribunals to publish their more important cases, to provide oral hearings, to have public sittings and to give reasons for their decisions. There is much to be said for the suggestion of a uniform method of official publication in a series entitled 'Administrative Notifications and Decisions'.<sup>3</sup>

Government departments and administrative tribunals would do well to heed the warning uttered in the House of Commons as long ago as 1872 by an acute member of that assembly, Mr. J. D. Dodson, member for East Sussex, Deputy Speaker and Chairman of Ways and Means Committee. In moving a series of resolutions for improving the machinery of the Provisional Order system as a substitute for local Bills, he observed that where great interests are at stake and feeling runs high, people are not satisfied with an order made on the decision of an official

Section 7 (4) proviso.

<sup>2</sup> Section 42 (7) (c).

<sup>3</sup> R. E. Megarry, *Administrative Quasi-Legislation* (1944), 60 *Law Quarterly Review*, p. 126.



sitting in a government office on evidence which nobody knows, and on grounds which are kept secret, nor with an order made on the decision of a government inspector sent down to make some general inquiry and liable to hear only *ex parte* statements. Provisional Orders, he said, to be generally acquiesced in, should be obtainable on application to a tribunal of a judicial character, possessing public confidence, before which promoters and opponents should be heard in open court.<sup>4</sup>

Another important defect in the working of administrative tribunals is the poor quality of the investigation into questions of fact which often takes place. I have already pointed out that one of the advantages of administrative justice is that it enables men with training or experience in special fields to take part in the determination of disputes, and also provides a means for using knowledge which has accumulated in a department. But special knowledge of a subject does not necessarily fit a man for the difficult task of eliciting the truth from intractable witnesses, nor give him the authority required to get at essential sources of information, nor enable him to distinguish successfully between those portions of the judicial procedure which are cumbersome and at times unnecessarily elaborate and long-winded, and those parts of it which are indispensable to a fair trial of any kind.

Laymen are often prone to be impatient at the formality and rigour of the procedure in a court of law; but its value has sometimes become evident after it has been abolished. The lack of confidence in the National Health Insurance tribunals expressed by some of the doctors' associations before the Royal Commission on National Health Insurance was based, ostensibly, at any rate, on 'defects of procedure. Thus, the Medical Practitioners' Union protested loudly and at length

<sup>4</sup> Parliamentary Debates, Third Series, 1872, Vol. 210, cols. 17-20.

against such features of the prevailing system as the presentation to the complainant of correspondence between a panel doctor and the Medical Service Sub-committee, relative to a charge made against the doctor; the submission to the Medical Sub-committee of letters from the complainant, which frequently contain 'irrelevant and prejudicial matter' unsupported by oral evidence; and the presence during the hearing of all the witnesses, complainant and accused, who were thus able to hear each other's testimony and adjust their own evidence so as to produce a consistent story.<sup>5</sup>

The whole method of establishing facts in English law, which lays far more stress on exact methods of proof than other legal systems, is based on the oral hearing, and the examination and cross-examination of witnesses thereat by trained lawyers representing the parties to the litigation. Administrative tribunals very often rely on unsworn written statements, unsupported by verbal testimony given on oath and subject to cross-examination. The judicial decisions of the Ministry of Health in regard to housing and public health matters, for example, were largely based on written memorials. The weakness of the *Umpire's Court* and the *Courts of Referees* lies in the fact that evidence is given mainly in writing, and the same applies to many other administrative tribunals. The employer of the worker claiming unemployment benefit has usually little interest in the case, and often does not turn up at the hearing. The applicant appears in person, while the evidence against him is in writing, and cannot therefore be scrutinised like verbal testimony. When it is remembered that both these courts provide an oral hearing, and are presided over by experienced lawyers, it can well be imagined that the evidence which is normally taken in cases decided by civil servants without legal

<sup>5</sup> Royal Commission on National Health Insurance, 1925, Appendix to Minutes of Evidence, Part 3, p. 470.

training is poorer still, both in regard to quality and quantity. It is clearly not desirable to require that the long-winded and elaborate methods of taking evidence which are proper to a court of law should be introduced into every dispute decided in Whitehall; but administrative tribunals would be better equipped to do their work if they were given the power to call for documents and compel the attendance of witnesses. Furthermore, an oral hearing should always be available where it is asked for by one of the parties; and the evidence should then be given in person at that hearing. Each party would thus have an opportunity of controverting the statements of the other side in a manner which is impossible, or at least difficult, where there is a mere exchange of written documents. Recognition of this principle is given by the statutory obligation recently imposed on Independent Schools Tribunals to afford all parties the opportunity for a hearing.<sup>6</sup>

This does not mean that a 'Day in Court' is to be held automatically in connection with every trifling dispute with which an administrative tribunal has to deal. But either party should be able to claim an oral hearing if he wishes. In a very large number of cases a desire to save expense, or to avoid personal attendance, or the existence of agreement as to the facts, would prevent the right to an oral hearing from being exercised.

Quite apart from the improved facilities for sifting evidence which 'the Day in Court' offers, there is a satisfaction in confronting judge and opponent, in seeing the judicial process at work as it were, which has an important psychological effect in obtaining assent to the authority of a tribunal and is not easily produced by a system of written communication. Nor is it desirable that lawyers should be prevented from practising before such

<sup>6</sup> Education Act, 1944, s. 71 (9).

tribunals.<sup>7</sup> The interests of speed can be safeguarded by maintaining a simple form of procedure, the interests of cheapness by prescribing a low scale of fees; and the flexibility and freedom of the tribunal maintained by what is in any event the only possible means: namely, by manning it with men whose minds are not set in rigid grooves, and who are capable of continually enlarging their horizon in accordance with the needs of the day. 'Executive discretion', says Professor Laski, 'is an impossible rule unless it is conceived in terms of judicial standards';<sup>8</sup> and one of the most certain methods of translating executive discretion into judicial standards is by allowing legal practitioners to analyse the decisions of a tribunal, and reduce them to definite order and coherence. What is now badly wanted in our governmental system is a co-operative effort between the legal mind and the administrative mind; the administrator pushing the law into unchartered provinces where new standards are required, the lawyer insisting that those standards shall be formulated in terms which are capable of judicial application. For this reason, among others, I think that lawyers should not be barred from appearing before any administrative tribunal whatsoever.<sup>9</sup> A move in the right direction is the admission of Counsel and solicitors before the Reinstatement Committees.

#### THE BOGEY OF POLITICAL INTERFERENCE

A great deal is often made of the allegation that administrative tribunals are incapable of acting impartially, but must, from their very nature, be subject to political

<sup>7</sup> Cf. Roscoe Pound, 'The Administrative Application of Legal Standards', *44 American Bar Association Reports*, p. 404.

<sup>8</sup> H. J. Laski, *Grammar of Politics*, p. 301.

<sup>9</sup> Professional advocates are permitted to appear before the Conscientious Objectors' Tribunals, but not many applicants have been represented by legal advisers. Mr. Pollard, a solicitor, states that 'after experience of some hundreds of cases the advantages of representation in the ordinary case are fairly apparent. In the first place, the advantage accruing from knowing a tribunal well is the same as that accruing from knowing a bench of magistrates. But justice is assisted by representation in another and

interference from the Government in power. The late Professor Dicey was obsessed by a fear of this danger<sup>1</sup>; and Sir Frederick Pollock seems apprehensive on the same score when he speaks of the ever-growing tendency 'constitutional traditions and safeguards notwithstanding, to confer more and more discretion, often of a substantially judicial kind, on officials of the great departments of State, who practically cannot be made responsible'.<sup>2</sup> Dicey admitted that there would be responsibility in the sense that the Minister in charge of the department exercising judicial functions would be liable to Parliamentary censure, but he thought that conformity to the wishes of the majority party in the House of Commons would be no security that the rule of law would be obeyed and only a feeble guarantee against 'action which evades the authority of the law courts'. He regarded the judicial powers of the National Health Insurance Commissioners—the precursors of the Minister of Health, and, more recently, the Minister of National Insurance—as tainted with the likelihood that they would play for favour with the electors in the discharge of their judicial functions.

As a matter of fact there is no evidence whatsoever which goes to show that the administrative tribunals now working in England are any more liable to political interference than the admittedly independent courts of law. It is as unscientific to *assume* without evidence that the former will be biased on political grounds as it would be for a fanatical believer in direct election to assume that

more important way. I find the majority of C.O.'s are unable to state their views logically or coherently, and the number of times they omit facts which have a vital bearing on the question of their sincerity is surprising. Some will conceal facts deliberately rather than make public matters that may be very much to their credit. I conceive an advocate's duty in these types of cases to be that of seeing that all material facts are placed before the tribunal'. 'Tribunals for Conscientious Objectors and Administrative Law', 22 *Public Administration*, p. 98.

<sup>1</sup> A. V. Dicey, *Law and Opinion in England*, 2nd ed., Introduction, pp. 41 seq.; 'Development of Administrative Law in England', 31 *Law Quarterly Review*, p. 152.

<sup>2</sup> Sir F. Pollock, *The Genius of the Common Law*, p. 43.

judges will be autocratic and irresponsible merely because they are independent and largely uncontrolled by popular action.

The original national health insurance scheme is, as a matter of fact, an example which supports an exactly opposite contention from the one which Dicey used it to illustrate. On December 27, 1911, a Treasury minute was issued in which the Chancellor of the Exchequer called the attention of the Board of Treasury to the position of the Insurance Commissioners in relation to the Board. The functions of the Commissioners, said the minute, fall into two categories: judicial and executive. 'The former functions, though by far the less numerous, are very important, and, in order to secure the necessary independence with regard to them any provision making the action of the respective Commissioners subject to the direction or control of the Board of Treasury was deliberately excluded from the statute. Similar independence, however, clearly cannot be granted to the Commissioners in respect of acts of a purely executive character', which would have to be defended in Parliament and in regard to which 'Their Lordships must have a deciding voice'.<sup>a</sup>

So far, then, from the Chancellor of the Exchequer attempting to influence the Commissioners in their judicial decisions—despite the fact that they were appointed, and could be dismissed, by the Treasury—he was insisting upon a separation of judicial and administrative functions, and calling for an independence and an impartiality in regard to the exercise of judicial power so complete that the observance of it became a positive embarrassment to the Commissioners in their administrative work.

The majority of disputes coming before the Commissioners in their judicial capacity were, at the outset,

<sup>a</sup> See Parliamentary Debates, Vol. 37, Fifth Series, col. 590, April 13, 1912, Mr. Masterman's speech.

appeals by members of approved societies against decisions made under the rules of the society, in regard to claims for sickness benefit by members. The rules of the societies were subject to approval in the first instance by the Commissioners, but great pressure of work in getting the scheme into operation prevented the rules from being carefully scrutinised before approval, with the result that many of them were defective and failed to provide cheap, quick or convenient access to the tribunal of first instance—that is, the domestic tribunal of the approved society. The strict separation of judicial and executive functions laid down by the Treasury minute severely handicapped the Commissioners from taking administrative action to remedy this unsatisfactory state of affairs, for the Commissioners were told that, as they had the power of giving a final judicial decision on appeal, they had no right to intervene administratively at any earlier stage in the proceedings. But having regard to the unsatisfactory rules which existed in many approved societies, such a preliminary intervention was often essential if injustice was to be prevented. So difficult was the task of administration rendered at times by the maintenance of judicial aloofness that the Commissioners were more than once driven to consider whether it would not have been better for them to abdicate their judicial functions for the sake of the greater executive freedom which they would have acquired by so doing.<sup>4</sup>

Another example of the independence of administrative agencies from 'political' interference in the discharge of their judicial duties is provided by the action of the District Auditor in the Poplar wage case. The District Auditor is appointed by the Minister of Health, and is

<sup>4</sup> Furthermore, there were certain conflicting decisions in cases under s. 66 of the Act of 1911 made by the Scottish, Irish, Welsh and English Insurance Commissioners respectively. The chairman of the Joint Committee complained that this would raise difficulties if he were called upon to defend these conflicting decisions in Parliament—to which reply was made by one Commissioner that judicial decisions do not require 'defending'.

removable by him. The Minister is also authorised by statute to regulate the auditor's work, which consists of examining the accounts of local authorities, and surcharging the members or officials with unlawful expenditure. In 1923 Mr. Carson Roberts, one of the auditors for the London District, surcharged the members of the Metropolitan Borough Council of Poplar in the sum of £5,000, in respect of their having paid the municipal employees of the borough a minimum wage of £4 per week, which he regarded as excessive, and therefore unlawful. The councillors appealed to the King's Bench Division of the High Court, which upheld the auditor. In 1924 the case went to the Court of Appeal, which by a majority quashed the surcharge. By that time the first Labour Government was in office, and the Minister of Health was Mr. J. H. Wheatley, whose advanced views on social and economic matters made it extremely likely that he must have been in favour of a £4 minimum wage being paid to municipal workers, if not to all employees throughout the country. Nevertheless, the district auditor, despite the general outlook of the Government and the political views of this particular Minister, carried the appeal to the House of Lords, where the surcharge was upheld.<sup>5</sup> Whether the auditor consulted the Minister before taking action is not known to the public, nor is it suggested that he acted with impropriety or without due regard to departmental discipline. But it seems clear that the avowed political sympathies of the Government did not for one moment influence the action of an official who felt himself bound to act, in the discharge of functions of a judicial nature, in a manner which appears to have been antagonistic to those sympathies.<sup>6</sup>

It is true that one swallow does not make a summer;

<sup>5</sup> *Roberts v. Hopwood*, [1925] A.C. 578.

<sup>6</sup> Cf. W. A. Robson, *The Development of Local Government*, Part 5, for a full discussion of the auditor's position. See also W. A. Robson, *The Law of Local Government Audit*.



but important cases of this kind, especially when there is an absence of any evidence to the contrary, go a long way towards disposing of the bogey of political interference in regard to the discharge of judicial functions by administrative agencies, which is always raised against administrative justice.

It is admittedly difficult for an administrative body to maintain a genuine impartiality in the discharge of judicial functions. But then it is difficult for any individual or any body of persons to maintain impartiality, which is the least 'natural' of all the mental conditions required by civilised society. That difficulty is, however, increased when natural impulses are not to some extent disciplined by resort to the 'artificial reason' of the law. On the other hand, public administration in modern England, particularly in the central departments, provides a continuous training in habits of mind no less impartial in their own sphere than are those of the judiciary; and it is impossible, taking the facts as we find them, to discover any grounds for ascribing a lack of impartiality to the discharge of judicial functions by administrative agencies.<sup>7</sup> The Special Commissioners of Income Tax, who consist of administrative officials employed by the Board of Inland Revenue, received high praise from the Committee on Ministers' Powers, which said that its impartiality gave general satisfaction. (It may be true, as Mr. Gerrard Henderson suggests,<sup>8</sup> that the maintenance of real impartiality is made specially difficult in a large organisation by the formation of personal friendships, group loyalties, and other ties which make for conflicting allegiances; but we think that the danger may be prevented by certain safeguards which we shall shortly suggest. )

The real disadvantages attaching to administrative

<sup>7</sup> Committee on Ministers' Powers, Report, p. 86.

<sup>8</sup> *The Federal Trade Commission*

justice in the form in which it now appears in England are, in my opinion, the lack of publicity which attends the work of most tribunals, the air of mystery and secrecy in which their deliberations are shrouded, the failure in most cases to give reasons for the decisions, or to publish reports of decided cases; the denial of a hearing in the majority of instances; and the poor quality and insufficient amount of the evidence on which decisions are often based. But so far there is nothing to show that administrative law has led to political interference with judicial determinations. There are indications, on the contrary, that in certain cases the desire to maintain impartiality in the discharge of judicial functions has actually hampered administrative action before trial.

#### THE STRUCTURE OF ADMINISTRATIVE TRIBUNALS

In the foregoing pages I have spoken repeatedly of 'administrative tribunals' when referring to the organs through which administrative law is exercised. But this is only a generic name for describing the various executive authorities on which judicial powers have been conferred, for those authorities differ widely as regards the machinery through which their powers are exercised. At one end of the scale are definite courts such as those of the umpire and the courts of referees for unemployment insurance claims, the Road and Rail Traffic Appeal Tribunal, or the Independent Schools Tribunals; at the other end are amorphous departments such as the Board of Trade or the Ministry of Town and Country Planning, in which there appear to exist no specially-differentiated organs for fulfilling the judicial functions with which their respective Ministers are charged.

Even within departments the composition of the tribunals varies enormously. There are independent public officers like the District Auditor or the Chief Registrar of Friendly Societies and Industrial Assurance

Commissioner. There are officials who, though subject to Ministerial control, occupy a distinctive office within a department, such as the Comptroller-General of Patents and Designs in the Board of Trade. There are specific tribunals composed entirely of civil servants engaged during the rest of their time in administrative work, such as the Special Commissioners of Income Tax. There are regional tribunals such as the Area Traffic Commissioners enjoying a high degree of independence yet subject to general direction and co-ordination by the Minister of Transport. There are special internal arrangements within departments as, for example, in the Ministry of Health, whereby complaints against practitioners engaged in health insurance work have been heard by advisory boards of referees, consisting of one lawyer and two doctors. In the same Ministry appeals from closing orders, compulsory purchase orders, and sanitary orders are decided by administrative officials, presumably in the ordinary course of their work. An inspector of the Ministry reports in this type of case but does not decide. His recommendations are by no means always accepted and he is often cross-examined severely by higher officials on his report and its findings.<sup>9</sup> There is, indeed, in the majority of departments, nothing that can really be regarded as a distinct tribunal with a separate identity of its own: not even a special judicial division within the department. The papers are sometimes passed round in the ordinary way till they reach the deciding officer; or an internal conference may be held within the department, the final decision being the outcome of an informal co-operative effort between several officials. Much the same thing happens in several other departments.

The question what is the best composition for an administrative tribunal is not an easy one to answer,

<sup>9</sup> I. G. Gibbon, 'Appellate Jurisdiction of Central Government Departments', 2 *Journal of Public Administration*, No. 4.

but I have no hesitation in saying that in all cases a definite, appointed and known tribunal should be created to discharge whatever judicial functions a department may have to perform. There might be separate tribunals within a single department for separate classes of cases, but in every instance a distinct and recognisable tribunal should exist. It is undesirable from the public point of view that judicial decisions should be made by members of a department who are unknown and unascertainable. The demand made by Mr. Arlidge that he should be told 'which, in this great department of State, were the actual minds or mind which judged his case' was based on a deep-seated human instinct which makes a man want to face his judge. And although Lord Shaw referred to the request as a 'grotesque demand to individualise the department for private purposes',<sup>1</sup> there is no insuperable objection to that being done.

The members of an administrative tribunal should be appointed by the appropriate Minister, who will usually, but not always, be the Minister responsible for the service or subject-matter in respect of which the judicial functions occur. There is no objection to some or even all the members consisting of officials on the staff of the department but in general it is desirable to include outside persons among the personnel of the tribunal. Often the wisest course is to compose the tribunal entirely of persons from outside the department but that should not be regarded as a matter of essential principle, unless the department is itself a party to the proceedings which fall within the jurisdiction of the tribunal. There is nothing antithetic to departmental discipline in civil servants serving either full-time or part-time on administrative tribunals. The official members of a tribunal would in the last resort be removable by the Minister. But the

<sup>1</sup> *Local Government Board v. Arlidge*, [1915] A.C. 120.

mere fact of being formally appointed to judicial duties within the department would give them an added sense of responsibility, and a valuable feeling of independence, which would not be diminished by their being required to conform to departmental policy in a way which I shall shortly describe. There are already many officials holding departmental positions which enjoy a distinct legal status, such as inspectors of schools, engineering inspectors, marine superintendents, insurance officers, and so forth; and in such cases there results a disciplined and qualified independence, a co-operation rather than a subordination,<sup>2</sup> which is broadly what is required for the work of administrative tribunals.

The Attorney-General's Committee on Administrative Procedure recommend that a similar policy shall be adopted in the United States. At present hearing officers are to be found in many of the great independent regulatory commissions whose duty is usually only to find facts. The committee recommends that hearing commissioners shall be appointed who would be 'fully empowered by statute to preside at hearings, issue subpoenas, administer oaths, rule upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law, and orders for the disposition of matters coming before them. . . . The hearing commissioners should be a separate unit in each agency's organisation'. They should have no other functions than those relating to adjudication.<sup>3</sup>

Only by the appointment of a definite tribunal is it possible to ensure a fair measure of that intellectual continuity which is a necessary element in the judicial process. 'In all judicial functions, the person who inquires into the facts should also decide the issue. The formation

<sup>2</sup> See *Simms Motor Unit v. Ministry of Labour*, [1946] 2 All E.R. 201, and my note on this case in 10 *Modern Law Review*, p. 70.

<sup>3</sup> Final Report, p. 50. For the views of three members of the Committee who propose additional recommendations, see p. 208.

of sound judgment seems to require that the preliminary survey of the ground should be undertaken by the same mind that subsequently evaluates the facts and determines the issue. When the judicial function is disintegrated and spread over several individuals in a large department, this cohesion between the related psychological processes of inquiring into facts and evaluating those facts in the final decision is lost, and the whole function deteriorates. The only certain way of maintaining essential intellectual unity is by establishing definite tribunals manned by one or more individuals who are responsible for the decision in all its stages.

The knowledge that the mind which inquires is also the mind which decides may be an important asset in securing that feeling of confidence in the authority of a tribunal which is an important requisite for the satisfactory administration of justice. One of the grievances put forward by the British Medical Association in connection with the administrative tribunals concerned with national health insurance was that no necessary connection existed between the opinions formed by the inquiring agency and the conclusion made by the deciding authority. When, said the Association, agreement had been reached with the profession as to the machinery and procedure for arriving at decisions in regard to complaints against doctors 'it is exceedingly disquieting to find that, though the machinery is used and the procedure followed, there are cases in which there seems little or no relationship between the decisions of the Ministry and the reports or recommendations of the bodies on which action is supposed to depend'.<sup>4</sup> It is an extraordinary thing, said the representatives of the Medical Practitioners' Union, that in coming to a decision the Minister acts not only upon the report of the particular case, but upon depart-

<sup>4</sup> Royal Commission on National Health Insurance, Appendix to Minutes of Evidence, Part 3, p. 450.

mental reports from the officers of the Ministry and other statements of which neither the appellant nor the inquiring body have any knowledge.<sup>5</sup>

The important investigation carried out in the United States by the Attorney-General's Committee on Administrative Procedure arrived at a similar conclusion. The committee was 'impressed with the fact that as the conduct of the hearing becomes divorced from responsibility for decision two undesirable consequences ensue. The hearing itself degenerates, and the decision becomes anonymous'.<sup>6</sup> Precisely the same defects attach to the public inquiries which are now required to be held in this country under statutory authority prior to Ministerial confirmation of clearance orders under the Housing Acts, and many matters relating to town and country planning and other services. An inspector on the staff of the department is usually deputed to conduct the inquiry but he seldom, if ever, has a decisive voice in the decision. No one knows who is ultimately responsible, apart from the purely formal responsibility of the Minister himself; nor is it known what weight, if any, is attached to the inspector's report. This is bound to have an adverse effect on the proceedings at the inquiry.

It seems clear that a unification of the business of inquiring and the task of deciding is necessary for the proper performance of the judicial function. Unification is advantageous both from the point of view of establishing an intellectual continuity between related psychological processes, and from the point of view of securing confidence in the decisions of the administrative tribunal concerned.

Incidentally, this unification would often give a department much greater freedom in its administrative work than it might otherwise possess. 'No individual',

<sup>5</sup> *Ibid.* p. 470.

<sup>6</sup> Final Report, p. 45.

observed ex-President Hoover, 'should be at the same time legislator, policeman, prosecutor, judge and jury.'<sup>7</sup> He was referring to the blending of powers in various bureaux and commissions in the United States, and spoke of the 'striking instances of oppression through the combination of semi-judicial with executive powers' committed by such bodies as the Bureau of Internal Revenue and the Immigration Bureau, which were, he added, caused less by the fault of the administrators than by the system. It is sometimes necessary, in the interests of good government, to confer legislative and administrative and judicial powers on a single department. But that does not make it impossible to avoid the disadvantages of combining the duties of policeman, prosecutor, judge, and so forth in a single officer. Separation of function within a department is always a desirable feature, and is always practicable, even though at the apex of the pyramid a single Minister is responsible for ensuring that all functions are efficiently performed. The allocation of all the judicial business to one or more distinct tribunals within the department is a necessary step in the attainment of this end. An official in charge of one branch of administration will not feel that it is necessary to stay his hand administratively in the interests of impartiality merely because the matter in question may eventually be adjudicated upon by another branch of the department. But if he himself is potentially the judge *in futuro* he may feel reluctant or unable to intervene. And if he does so, great difficulties may result at a later stage of the proceedings, as some of the more recent cases in the High Court show.<sup>8</sup>

Fortunately, there are signs that the legislature is recognising to an increasing extent the desirability of providing for the establishment of definite tribunals to perform the judicial functions arising in connection with

<sup>7</sup> 'Government by Guess', *Nation*, New York, December 9, 1925.

<sup>8</sup> See *ante*, Chapter 7



administrative law. There has, indeed, been a notable increase in statutory administrative tribunals since this book was first published in 1928. The National Service Acts, the National Insurance Acts, the Education Act, 1944, the Road Traffic Acts, the Family Allowances Act, the Reinstatement in Civil Employment Act, the National Health Service Act, the Furnished Houses (Rent Control) Act, are among the many recent statutes which prescribe specific administrative tribunals to be appointed and regulated by Ministers. The tendency is, nevertheless, not exclusively in this direction, for judicial powers have also continued to be conferred in an undifferentiated form on individual Ministers, such as the Minister of Town and Country Planning, the Minister of Transport, the Minister of Education, the Minister of Health, and the Minister of Fuel and Power.\*

We can say, however, that since 1930 legislation on balance shows a distinct preference for definite tribunals. One hopes this highly desirable tendency will continue. It is far better, where administrative justice is concerned, for Parliament to prescribe a definite tribunal than to leave the matter to chance. If judicial powers are conferred on a Minister, experience shows it to be exceedingly improbable that he will appoint a definite tribunal within his department, although there would appear to be no legal or constitutional objection to his doing so.

The tendency to prescribe definite tribunals is not confined to the exercise of what the Committee on Ministers' Powers called 'purely judicial decisions', as they recommended, but includes those involving 'policy' as well as 'law'. This distinction in the report has been ignored as a criterion for deciding whether to confer judicial powers on a Minister or on a definite tribunal to be appointed by a Minister.

\* Details will be found in Chapter 3.

In the United States, as in England, there has been an equally marked tendency to set up specific administrative tribunals in the form of the great regulatory commissions, the aim being 'to divorce the administrative process from a too obvious connection with the executive by making it an independent tribunal'.<sup>1</sup> These independent regulatory commissions are often very large bodies exercising a mass of legislative, administrative and judicial functions. They have no precise counterpart in this country and cannot be regarded only as administrative tribunals in our sense of the term. But within these commissions there is a movement towards the specialisation of the judicial function by allocating it to a separate bureau or organ. 'Adjudication, as distinguished from the presentation of claims', Mr. Landis tells us, 'is generally centered in trial examiners who, as a matter of internal organisation, are not subordinated to any official other than the commission itself. The adequate development of these staffs would provide judges who have, as they should have, an understanding of the general policy of the administrative, indeed a proper bias towards its point of view, and yet, by having been entirely dissociated with the earlier phases of the proceeding, have no personal interest in the outcome.'<sup>2</sup>

The most favoured type of administrative tribunal which has emerged in the past decade is that exemplified by the courts of referees set up under the Unemployment Insurance Acts. These consist of an independent chairman, a member representing employers and a representative of the workpeople (in their capacity of insured contributors). The chairman usually possesses legal qualifications, and in addition he often has some special knowledge of economic or social conditions.

<sup>1</sup> J. M. Landis, *The Administrative Process*, p. 100.

<sup>2</sup> *Ibid.* p. 104.

Three-man tribunals of this mixed type have for many years performed a vast mass of difficult duties connected with claims for unemployment benefit with conspicuous success. They have demonstrated the possibility of reconciling divergent attitudes in a genuine attempt to discharge fairly and judicially the considerable responsibilities entrusted to them, subject to the overriding authority of the Umpire's decisions. They have shown themselves to be potent instruments of social peace.

For these reasons tribunals of this type were doubtless chosen to adjudicate on a wide range of industrial questions connected with the war and with the return of men and women from the Forces into their pre-war employment. The local appeal boards which heard cases arising under the Essential Work Orders and appeals from directions to enter war industry issued by the national service officers, and the reinstatement committees appointed under the Reinstatement in Civil Employment Act, 1944, are constituted on similar principles. Similar bodies were chosen to determine issues of wider import where the State itself was directly concerned, such as postponement of call-up to the armed forces, appeals against directions to join the Home Guard or full-time Civil Defence work, and other forms of compulsory national service. They were also asked by the Ministry of Home Security to hear and determine applications for exemption from compulsory fireguard duties.

It will be surprising if in the future this type of administrative tribunal is not used for other new and important tasks, such as the determination of claims under the National Insurance (Industrial Injuries) Act, 1946. Under this statute a vast mass of work relating to workmen's compensation cases has been removed from the ordinary courts, where it occupied a great deal of the time not only of county court judges but also of the Court

of Appeal, and transferred to the sphere of administrative adjudication.'

It is desirable not only that definite tribunals should be nominated for the discharge of judicial functions, but also that special 'court' rooms should be allocated for the deliberations of the tribunal. The influence of physical environment on human beings is a subtle thing; and the mental association of a particular place with the exercise of judicial functions may help to produce an atmosphere in which a man feels more impartial and independent, less the creature of prejudice and habit, than in other surroundings where he is accustomed to do work of a less exacting or more subordinate nature. It is even desirable, where possible, that the tribunal should sit in a room outside the ordinary departmental offices; and several departments might together maintain one or two 'court' rooms for this purpose, and share the expense among them. Separate accommodation is provided for the industrial court and the umpire, unconnected with the offices of the Ministry of Labour and National Service; and this example might well be followed by other departments.

But these considerations are of less importance than the question of the actual composition of the tribunal. The administration of justice, whether carried on by the judicature or by special tribunals, depends, to a greater extent than many institutions, on the calibre of the personnel. Organisation is of secondary importance.

#### THE PERSONNEL OF ADMINISTRATIVE TRIBUNALS

When we examine the type of individual concerned in the operation of administrative justice in England, we are once again confronted with a bewildering diversity. Lawyers, business men and representatives of workmen deal with unemployment insurance; doctors with health

<sup>3</sup> *Ante*, pp. 194-201.

insurance and the public medical service; engineers with sanitary questions; architects and surveyors with building controversies; accountants with local government expenditure; school teachers with educational complaints; scientists with patents and inventions; civil servants of the higher ranks with various other affairs. Can any working rule be laid down as to what sort of qualifications are required?

‘In choice of Committees for ripening *Businesses*’, said Francis Bacon, ‘it is better to choose Indifferent persons, than to make an Indifferency, by putting in those that are strong on both sides.’ But while it is better to have persons who are ‘Indifferent’ in the sense that they are not prejudiced in favour of either side, it is not desirable that the personnel of administrative tribunals should be ‘Indifferent’ in regard either to their training or natural capacity. Administrative justice, as I have already pointed out, has been largely directed towards the setting up of new standards in hitherto unexplored fields; and it is almost impossible to achieve this in many spheres of social control without special qualifications. The ‘laymen’ on the courts of referees are in reality specialists in the conditions of industrial employment. The same applies to the members of the reinstatement committees and to many other administrative tribunals.

While technical knowledge is often needed for the adjudication of disputes, there are grave objections to giving judicial power into the hands of specialists whose outlook is confined to a single field. The worst defect of the domestic tribunals which we have described in a previous chapter is the opportunity they provide for narrow professional instincts and group habits to assert themselves without let or hindrance; and the main disadvantage of such tribunals is the domination of the

judicial process by petty loyalties and outworn traditions which predetermine the conclusion and render an impartial investigation impossible.

What is really needed is a combination of legal training with special experience or training in the particular field in which the jurisdiction is to be exercised. One way of securing this is by including on the tribunal both lawyers and specialists. Another method is by enabling each member to become qualified in both fields. Where specialist problems have to be solved, we need young judges with a knowledge not only of law but of one or two other subjects as well. The administrative judiciary of the future should consist of youngish men who have had a training in law, who have taken a law degree, or been called to the bar and perhaps practised a little, and who have also a knowledge of the social sciences such as economics, government, public health, business administration, or educational science. It does not matter which comes first, the law or the other specialism—both are necessary. The tradition that judges must invariably be drawn from the ranks of successful advocates who are usually well past middle age cannot and should not be applied to administrative tribunals, for obvious reasons. The alternative of employing administrative officials on judicial work in their spare time, regardless of their suitability or training, will break down where great interests are at stake and important issues draw critical attention to the composition of a tribunal.

It will often be necessary to reinforce a tribunal by nominating members from outside the department to assist in its deliberations. When the subject-matter of the controversies which come before the tribunal is an interference with individual liberty or property of a kind which arouses strong opposition, its authority may be greatly strengthened by the introduction of persons representing outside interests or experience. Sometimes it will be

advisable to nominate all the members from outside the ranks of officials, but this is not a question where rigid rules can be laid down. The proper composition of the tribunal must depend on the nature of the jurisdiction it is to exercise, the type of knowledge or experience required, the relative importance of securing a representative of the departmental view or of the non-departmental view, as the case may be, and other factors of a similar kind. The appointment of outside members does not necessarily involve the selection of persons representing sectional interests. It may mean the nomination of individuals chosen solely for their personal qualifications.

All appointments should be made by the appropriate Minister, who will normally be the one responsible for the subject-matter with which the jurisdiction is connected. If, however, a department is itself likely to appear frequently before a tribunal as a party to the disputes which it will decide, there is much to be said for the members being appointed by a Minister other than the one in charge of that department. Appointment by the Crown undoubtedly lends an aura of dignity and prestige to the more important tribunals, but there is nothing specially to commend the Lord Chancellor as the appointing Minister in view of the long tradition of patronage which attaches to his office.

The experience of the past twenty years shows that, as regards the size of the tribunal, three is the optimum number of members. The three-man tribunal has become almost a standard feature of administrative justice in several important spheres of activity, such as industrial relations and social insurance.

If personnel of good calibre is to be obtained from outside the ranks of officials for service on these tribunals, they must be adequately paid. This is not at present understood by several departments. The remuneration offered by the Ministry of Labour and National Service to

the chairman of a court of referees or a local appeal board, for example, is a fee of two and a half guineas for about three hours' exceedingly hard work at a remote employment exchange which may involve another hour or two of his time in travelling. The chairmen of conscientious objectors' tribunals receive three guineas for a half-day while the other members receive a similar sum for five hours' work. Similar remuneration was paid by the Ministry of Health to referees appointed by him to decide appeals under the Widows', Orphans' and Contributory Old Age Pensions Acts.

These standards of remuneration have remained unchanged for many years. They were inadequate when they were first fixed. Today they are ludicrous and are bound in the long run to have an adverse effect on the quality of the personnel which is available for service on the tribunals.

Similar complaints have been made of the position in the United States, where the trial examiners' staffs of the great regulatory commissions are said to have insufficient competence owing to the low salaries paid to them under the regulations. There the examiners are civil servants and in 1938 they were entitled to a salary of only \$4,600 a year, a figure at which it was impossible to attract men of the right qualifications and experience.<sup>4</sup>

#### THE DANGERS OF ADMINISTRATIVE LAW

This brings us to another question of great importance. What are the limitations of administrative justice as it now exists in England? Is it possible to define the frontiers? While it is impracticable to draw a line between the sort of case which can be successfully disposed of by administrative tribunals and the type of controversy which must be left to bodies armed with merely advisory

<sup>4</sup> J. M. Landis, *The Administrative Process*, p. 105.



powers, it is possible to indicate with some certainty the kind of dispute with which administrative tribunals are definitely unfitted to deal.

¶ The greatest danger with which the development of administrative justice in England is faced at present is the possibility that in the near future an attempt may be made to cut through our economic difficulties by handing over the disposal of economic controversies to official tribunals armed with plenary powers of decision and enforcement. The continual interruption of industrial production by labour disputes, the allegations of profiteering in foodstuffs and other essential commodities by combinations of producers or distributors, the assertion that utility undertakings enjoying a high degree of monopoly are maintained with an eye to the making of profits rather than to the provision of service to the public; all these discontents may easily lead to an effort to resolve economic conflict by the setting up of administrative tribunals of one kind or another—probably with an infusion of non-official members—entrusted with powers to adjudicate upon these difficult matters. Administrative law has in the main grown out of the application of public administration to economic and social services, and it might appear that the public regulation of private enterprise by means of similar tribunals would follow easily in the natural course of events and be attended with equally good results.

But such an idea is based on a fallacy; or, rather, on a series of fallacies. All that a tribunal can do, whether it be a court of law or a government department or an independent commission, is either to apply the rule, to interpret a doctrine, to arrive at a 'fair' decision, or to approach as near to 'fairness' as is possible. But in our present economic order a quantitative manifestation of fairness does not exist. There is no such thing known to economic science as a fair price, a fair wage, a fair day's

work, or a fair rate of profit. Value, wages, rent, interest and profits are not determined by any question of fairness but by the operation of a series of complex forces based on self-interest and the assumed desire of each person to get as much as possible for his services or his property. Any attempt to settle economic controversies by reference to a hypothetical and non-existent basis of 'fairness' by means of administrative tribunals is almost certain to end in disaster. The mediæval regulation of trade and industry all hinged around the conception of the fair wage and the just price and so forth; but even in those far-off days neither canon law nor common law was able to evolve workable or even recognisable standards of what economic justice demanded, and in our own time such an attempt would be utterly futile.

Professor Ernst Freund, writing of the attempt in the United States to give jurisdiction to various tribunals, such as the Inter-State Commerce Commission, over the conduct of public utility undertakings, says that we should bear in mind that 'underlying these difficulties of administrative procedure is the attempt to answer perplexing questions of economic policy by the method of trial from case to case with which we are familiar in the upbuilding of the common law. . . . It seems to be believed that by a combination of administrative and judicial action it will be possible to evolve a code of fair trading; perhaps it can be done in part, but it is not likely that highly controverted issues will be ultimately settled otherwise than by direct legislative action. It seems also to be believed that the like methods can settle the perpetual contest for profit and advantage which lies at the foundation of our entire economic institutions, the assumption being that there are standards of equity which should control the quid pro quo in service and return, as applied to undertakings affected with a public interest, perhaps even as applied to labour and wages, and which

can be discovered by patient and impartial experimentation'.<sup>5</sup> Professor Freund gives examples of the way in which legislation has conferred judicial powers in these matters. There are statutes in which administrative tribunals are given specific judicial power to decide questions of fraud, discrimination, monopoly, price control, unreasonable charge, inadequate service. Consider these terms, he says, and you will recognise the gradation from common legal certainty to utter indefiniteness. A grave danger in the United States, he points out, is that indeterminate powers of this kind may be abused by using them to promote private financial interests. 'The more indefinite the standard, the greater is obviously the temptation to use the law as a weapon to gain economic advantage, using the public interest as a shield.'<sup>6</sup>

While the question of corruption is not one which need give rise to serious alarm in England, the possibility that administrative tribunals may be set up to discover non-existent and undiscoverable standards is a real danger. Such tribunals will not merely fail to accomplish anything but will work much positive evil by hampering economic activity in a meaningless fashion. Their decisions will be evaded and disobeyed, and the whole fabric of the law, of which administrative justice forms a part, will be degraded. If the Legislature calls upon the administration to evolve standards in matters which cannot be dealt with in that way or itself prescribes intrinsically erroneous or unworkable standards, no skill in devising procedural safeguards will produce just or beneficial results.

The Legislature can itself, of course, attempt to define in exact terms what is to be regarded as the standard of fairness in such matters as wages, prices, etc., and the

<sup>5</sup> Ernst Freund, 'Commission Powers and Public Utilities', *American Bar Association Journal*, May 1923.

<sup>6</sup> Ernst Freund, *loc. cit.*

work of the administrative tribunal would then be confined to the comparatively simple task of interpreting those standards and applying them to particular cases. But it is difficult to believe that Parliament would ever try to crystallise in rigid statutory form the fluctuating and transient equilibrium of economic life. The result would be highly detrimental to industrial prosperity under any system of economic production.

This is not to say that the further control of economic life is either impracticable or improbable. All that we are concerned to point out here is that the wrong method of control is to give jurisdiction to administrative tribunals in vague terms containing undefined or undefinable standards, and to expect that economic conflict will thereby be resolved. Methods easily get misapplied; and the method of official adjudication, if it is divorced from administrative provision, is unsuited to the social control of private enterprise. It is legislation that must be employed for that task: definite and exact legislation, transferring economic power from private hands to public bodies, and enacted either by a sovereign Parliament or by subordinate bodies to whom power has been delegated.<sup>7</sup> The legislation may aim at promoting divers objects which it is beyond our purpose to discuss here; but I venture to assert that where it is desired to bring about economic change, the method to be adopted should be by an Act of Parliament which itself effects the required object, or describes it in exact terms. Any attempt to shift the burden on to the shoulders of administrative tribunals is not likely to meet with success.

That is one great danger. Another great danger which confronts the development of administrative law in England is the possibility that, as the judicial powers of administrative bodies increase in scope and extent (as

<sup>7</sup> An example of a subordinate body of this type is a Wages Council, which is not an administrative tribunal but a subordinate legislative authority.

they have done in recent years and are likely to do in the future), such functions may be discharged in a perfunctory manner by incompetent officials of an inferior type or by low-grade personnel appointed from outside the civil service on the cheap. The strength of the English legal system lies to no small extent in the fact that the judicature is composed of men of unusually high character, of exceptional integrity, and of legal ability beyond the normal. The average judge has never known the subordinating experience of being 'employed', or the attendant liability to be dismissed; he has the assurance and the conscious independence which comes from the successful practice of a profession; and he is usually steeped in a traditional veneration for the law and all its works. Although he has to share the imperfections of human nature, he fills his office in a way which makes the judicial process universally respected, and that is no small achievement. Whether the Ministers in charge of the great departments of State will realise that the very best type of man is required for the proper discharge of judicial functions, even where the subject-matter in particular cases concerns affairs of apparently small moment, remains to be seen. But the possibility of inadequate attention being paid to the personal equation is a real danger.

#### THE REGULATION OF ADMINISTRATIVE TRIBUNALS

It is sometimes said by strict legalists that the discharge of judicial functions by administrative bodies would be more acceptable if their decisions were subject to review by the ordinary courts of law. The concession implied by this is more imaginary than real. If the decision of an administrative tribunal is liable to be upset by the courts of law on grounds other than that of defective procedure, the hearing by such a tribunal becomes, in all important cases, a mere preliminary to trial in court, and the whole object and aim of administrative law is frustrated. It is

reasonably clear that if administrative law serves any useful purpose at all—and I have argued at some length that it does—we must accept it as a system in the main independent of the courts of law, and reject any proposal to subject it to the contingent control of those courts. Otherwise we shall merely be thrown back on to the legalism and unfreedom of the formal judicature, the avoidance of which is one of the main objects sought to be obtained by the machinery of administrative justice. I have argued in an earlier chapter that administrative tribunals should be compelled to use their discretion judicially; that where it can be proved by an interested party that the members of such a tribunal did not hear the controversy with an open mind, or had virtually prejudged the issue; where they have misused their power to further unauthorised purposes, however well-intentioned; where they are influenced by sinister motives or extraneous considerations: then in those circumstances the proceedings should be subject to review in the courts of law and the decisions set aside. But apart from that special type of exception, the work of administrative tribunals must remain independent of the courts of law, and their decisions be free from liability to be investigated and quashed.

Nevertheless, although administrative tribunals must normally be independent of the courts, it does not follow that there are not other methods by which their activities may be controlled. But before discussing these I would suggest that there is no valid reason why the absolute immunity from legal liability which is enjoyed by judges should be applied to the members of administrative tribunals. It would be a good thing if the personal responsibility of such individuals was established at least to the extent of making them liable in the courts of law for damages where malice or negligence or interest or corruption or fraud could be proved by a party to a

dispute. This suggestion is closely bound up with the proposal I have already made that definite tribunals should in all cases be set up where judicial functions are exercised by government departments.

✓ An important matter regarding the regulation of administrative law is the relation between the policy of the government department and the decisions of the tribunal. One of the advantages of administrative justice, I have suggested, is the ability of the tribunal to promote a considered policy of social improvement. But at present no one knows what that policy is at any given moment, or even whether a policy exists. The result is that unnecessary confusion and uncertainty obtain, and the decisions of the tribunal appear unpredictable and often incoherent. This has been most noticeable in the case of the Ministry of Health in regard to public health and rehousing matters.

What I suggest is that, when a specific tribunal has been appointed within a department, for which the Minister in charge is responsible, the policy (if any) which it is intended the tribunal should follow should be definitely formulated and openly declared in a Letter of Reference or regulation from the Minister to the tribunal.

Perhaps I may elucidate the idea by an illustration taken from the Road Traffic Act, 1930. By that statute the Area Traffic Commissioners are required to act under the 'general directions' of the Minister of Transport. When the Bill was going through the House of Commons, Colonel Ashley, a former Minister of Transport, moved the omission of the word 'general' in this clause, urging that it was essential for the Minister to have complete control over the commissioners. This amendment was resisted by Mr. Herbert Morrison, the Minister of Transport in charge of the Bill, on the ground that it involved a misapprehension of what was intended. He

explained that he had no intention as Minister of attempting to direct the commissioners on every point of their duty. It appeared to have been assumed that he was to be answerable in Parliament for the specific actions of the commissioners. That, however, was not the case. He could only answer for the general action of the commissioners, not for whether they had done right or wrong in any particular case.<sup>8</sup>

If the Minister of Transport has a policy in regard to the complex and difficult problems of road transport regulation with which the Traffic Commissioners are concerned, he ought to state that policy clearly in the form of general directions to the commissioners; and these directions should be public documents analogous to the Letter of Reference which I have suggested above. So far as I am aware, no general directions of this kind relating to policy have ever been published, though it may well be that some have been given confidentially to the commissioners.

The Minister did, however, seek the advice of the Amulree Committee on various questions relating to the London traffic problem, in order that his decisions in appeals coming to him from determinations by the commissioners might be based on a clearly-conceived policy. His action in referring the matter, in adopting the recommendations of the committee and in applying them in a particular case were not merely upheld but warmly commended by the High Court judge before whom they were challenged.<sup>9</sup> It would seem to be only a step further in the same direction for the Minister to direct the commissioners or any other administrative tribunals on the policy they should follow in their decisions.

<sup>8</sup> W. A. Robson, *Public Enterprise*, p. 362.

<sup>9</sup> *R. v. Minister of Transport, ex p. Grey Coaches, Ltd.*, Times newspaper, February 23 and March 29, 1933. *Ante*, pp. 298-9.



An example where this was done is the National Service (Armed Forces) Act, 1939, which authorised the calling up of men to the Forces on the outbreak of war. I have already described the Military Hardship Committees which were set up under this measure to hear and determine applications for postponement of liability to serve in the Forces on the ground of exceptional hardship.<sup>1</sup> Under the Act,<sup>2</sup> the Minister of Labour and National Service was authorised to make regulations 'as to the principles to be applied, and the circumstances to which regard is and is not to be had on the hearing of any application for the grant or renewal of a postponement certificate, and as to the period for which a postponement certificate may be granted or renewed'. Under these powers the Minister issued regulations defining exceptional hardship and laying down the principles to be followed in deciding applications.<sup>3</sup> This is exactly the kind of Ministerial action which I have for long regarded as being a proper means of bringing administrative tribunals into conformity with governmental policy, though in this particular instance the regulations were not of great assistance.

The same applies to the purely departmental exercise of judicial powers conferred on a Minister. There can be no reasonable objection to the Minister coming frankly into the open and publishing a plain exposition of the principles which are intended to inform the decisions of his department, a statement of the considerations which, in his view, should carry most weight in determining the conclusion. These statements should take the form of 'instructions' to the deciding body by the Minister. They need not be immutable; they can be changed from time to time as occasion demands. But they would serve

<sup>1</sup> *Ante*, pp. 181 *et seq.*

<sup>2</sup> Section 6 (7).

<sup>3</sup> National Service (Armed Forces) (Postponement Certificates) Regulations, 1939

a valuable purpose in informing the public what may be expected, and would lend coherence to what may otherwise often appear to be disconnected and unrelated decisions.

I would even go so far as to suggest that the Minister's influence over a tribunal should be confined exclusively to published regulations or Letters of Reference of this kind ; and that apart from public documents such as these there should be no attempt to curtail the independence of the officials appointed to serve thereon. The Minister should be required to direct the tribunal in the open, as it were, where the full light of criticism and publicity can shine on his policy. He should not be permitted to instruct the adjudicating officials secretly, nor influence them by backstairs or haphazard or informal methods. Furthermore, the necessity for producing a consistent policy might be valuable as a mental exercise for the Ministry itself.

It is not necessary that any loosening of the bonds of departmental discipline nor any lessening of Ministerial responsibility should result from this device. It is exceedingly doubtful whether Ministers are answerable to Parliament in the strict sense for the exercise of judicial powers by their departments. Informed opinion is inclined to the view that a judicial decision does not need to be 'defended' in Parliament and perhaps cannot be questioned there. Whatever the true answer may be to this knotty constitutional problem, the members of a departmental tribunal, when they are exercising judicial functions entrusted by statute to the Minister, must remain amenable to his authority. The extent of the Minister's responsibility, if any, to Parliament will certainly not be affected by the fact that he has institutionalised his judicial functions by designating certain officials to form a tribunal within the department to exercise them on his behalf ; nor by his instructing such a tribunal of the policy which he wishes it to follow in the

form of an open Letter of Reference or regulation. But there is a vast difference between the subordinate official who is subject to verbal orders handed down casually from day to day as occasion demands, and the public servant formally appointed to judicial duties within a department, who is charged with interpreting a public statement of Ministerial policy, but who is otherwise largely independent so far as his judicial work is concerned, though in the last resort removable by the Minister.

It is quite clear that where legislation requires a Minister to appoint a definite administrative tribunal to determine specific questions, he will not be responsible to Parliament for its individual decisions, even though he may have to answer for the general efficiency of the tribunal. This immunity of the Minister from responsibility for individual decisions will prevail irrespective of whether or not he is entitled to give such a tribunal general directions as to the policy it should follow. This was clearly the view stated by Mr. Morrison concerning the degree of responsibility to be assumed by the Minister of Transport for the Area Traffic Commissioners. It also accords with common sense.

The strong trend in recent years towards the creation of definite administrative tribunals derives, no doubt, to some extent from the desire of Ministers to divest their departments of responsibility for the exercise of judicial powers, not only in Parliament but also in the press and in the eyes of the public. Ministers do not want to be pestered by trade unions and all the many other associations representing organised interests whose members may be affected by an adverse decision in an important unemployment insurance claim or pension case. The easiest method of avoiding unwelcome attentions of this kind without sacrificing the advantages of administrative

justice is to devolve judicial powers on to statutory administrative tribunals.

3) Another step in the regulation of administrative tribunals—or perhaps we might say the regularisation—would be the establishment of higher administrative tribunals to which appeals could be taken. The existence of a superior authority, to which resort may be had by a dissatisfied party, diminishes the possibility of a careless or hasty decision by the tribunal of first instance, and tends to imbue the members thereof with that feeling of accountability for their actions which lies at the bottom of a true sense of responsibility. The psychological value of appeal tribunals might be considerable, both from the point of view of the parties to the dispute and the adjudicating members of the tribunal of first instance. The main justification for a hierarchy of courts in any system of law is the careful attitude which judges tend to adopt towards their work when they know that there are others above them who are likely to scrutinise it critically or, conversely, others below them who will have to interpret and apply their decisions to differing circumstances. There is no reason why the right of appeal should not be as effective a method of control among administrative tribunals as it is in courts of law.<sup>4</sup>

The tendency in recent years has been to provide some form of appeal from the decisions of definite administrative tribunals, where these have been established. Thus, the National Service Acts provide for an appeal from the Military Hardship Committees to the Umpire and there is a similar appeal from the Reinstatement Committees. The new National Insurance Act requires a final authority to be set up called the National Insurance Commissioner,

<sup>4</sup> See the remarks by Hewart, L.C.J., on the valuable effect of the Court of Criminal Appeal on the administration of English criminal law, in his address to the American Bar Association, *The Times*, Sept. 2, 1927. And observe, *per contra*, the moral pointed by the deplorable history of the Green and Vanetti trial.

who will hear appeals from the local tribunals. In the scheme of national insurance for industrial injuries the appellate authority is an Industrial Injuries Commissioner. There is an Appellate Tribunal for Conscientious Objectors. Appeals from the Traffic Commissioners lie to the Minister of Transport in respect of road passenger services, while the Road and Rail Appeal Tribunal exercises appellate powers in regard to road haulage licences. The Minister of Health is to hear appeals from the special tribunals which will inquire into complaints against doctors under the National Health Service Act, while the Home Secretary has an appellate jurisdiction under the Police (Appeals) Acts.

This trend is undoubtedly in the right direction, in the sense that a right of appeal in matters of importance is an essential safeguard of justice, subject to a reasonable degree of finality being attained in the ordinary run of cases, and proper restrictions being imposed to prevent the higher tribunal being overwhelmed by trivial, useless or unnecessary appeals.

At the same time we have an impression of a great lack of system in the organisation of appeal tribunals. Most of them are ad hoc and specialised bodies. It is difficult to see on what ground of principle Parliament has sometimes prescribed a Minister and on other occasions a definite tribunal to exercise appellate powers. The question of establishing administrative appeal tribunals exercising a wider and more general jurisdiction clearly calls for consideration.

Although I do not consider that administrative tribunals should be subjected to any greater measure of control by the courts of law than they at present receive, the existing right of review on questions of jurisdiction and procedure should undoubtedly be preserved. A suggestion was made to the writer many years ago by an eminent Lord Justice of Appeal that all administrative

tribunals should be brought within the scope of a controlling statute, which would bring them under definite regulations. The main effect of this, assuming that the actual power of final decision were not touched, would be to bring all administrative agencies performing judicial functions into conformity with a single general code as regards their method of procedure and so forth.

With the increasing number and diversity of administrative tribunals, the growing range and complexity of the matters with which they deal, and the variations in their procedure, there is much to be said for introducing some measure of consistency and system into their activities. It is not necessary to impose a uniform procedure upon every tribunal regardless of the special needs of its jurisdiction, but rather to lay down certain overriding principles to be applied by all administrative tribunals in the manner best suited to their individual functions.<sup>5</sup>

#### THE CONTROL OF DOMESTIC TRIBUNALS

A much stronger case can be made out for the regulation of those multitudinous bodies of a private or semi-public nature which I have called domestic tribunals, than for interference with administrative tribunals. I have already indicated in an earlier chapter the nature of the judicial power exercised over their members by the governing organs of professional and vocational associations, trade

<sup>5</sup> Much thought has been given to this question in the United States, particularly in the course of the very extensive investigation made by the Attorney-General's Committee on Administrative Procedure, whose final report was published in 1941. The Committee drafted a Bill to regulate the matter which provided, *inter alia*, for the establishment of a Director of Federal Administrative Procedure to exercise a continuous supervision over the practices and procedure of administrative tribunals. Following this Report, Congress passed the Administrative Procedure Act, 1946, which differed in several respects from the Committee's recommendations. Opinion in the U.S. is by no means unanimous as to the value of this recent legislation, and we should do well to watch carefully developments here & the 't'ntic

unions, friendly societies, clubs and other voluntary groups, marketing boards and similar statutory bodies, and have described the almost complete freedom from review by the courts of law which the decisions of such bodies enjoy.

The power of these domestic tribunals is very large indeed. A trade union may condemn a man for failure to conform to some petty trade practice, to what a learned judge described as 'industrial death'. The General Medical Council may deprive a doctor of his means of livelihood for associating with a skilled osteopath who is qualified abroad but not in England; for making himself or his work publicly known by any method which by a stretch of the imagination could be termed 'advertising' (an offence which may include even 'undue particularity or elaboration' of a name-plate on the front door of his house)<sup>6</sup>; or for committing any act which is regarded by his professional colleagues as 'scandalous conduct in a professional sense'. A West End club may ruin a man socially by expelling him for a difference of opinion with one of its leading members. Yet provided that the tribunal does not exceed the jurisdiction conferred on it by the rules of membership, the enabling statute, charter, or other instrument, the courts of law will in no circumstances review the decision unless the rules of 'natural justice' have been infringed through some flaw in the procedure.

But the rules of natural justice concern what are in effect only the more superficial aspects of the case. They prescribe that the member must be given an opportunity of stating his case, that no individual who is on the tribunal may be personally interested in the dispute, and

<sup>6</sup> See the text of the 'Warning Notice' issued by the General Medical Council in June 1923, para. 6; also the report on this notice drawn up by the Central Ethical Committee of the British Medical Association. Cf. Dr. Lloyd's case, reported in *The Times*, November 30, 1925.

so forth. Such considerations touch merely the outward forms of justice and leave the substance of the decision uncontrolled.

There can be little doubt that much injustice results from this concentration by the courts on the forms of justice rather than on its essential spirit. In one case the expulsion of a woman from a ladies' club was declared invalid because a member of the committee, a titled lady, who had only consented to serve on condition that she was not bothered, was not informed of the meeting which was held to consider the case.<sup>7</sup> But the ends of justice cannot be safeguarded by insisting on the mere notification of even a duchess, and I am strongly of the opinion that the decisions of domestic tribunals should be subject to review by the courts of law, even where the appellant is not able to prove malice or interest on the part of the members of the tribunal.

The distinction between domestic and administrative tribunals rests on a fundamental difference of outlook. Administrative tribunals are manned by public officials who have nothing to gain or lose by the decision, who are accustomed to administer public services impartially and without favour, who are usually unacquainted with the parties to the dispute, and who are professionally concerned only with serving the public. They are, moreover, subject to control and removal from office by a Minister of the Crown who is answerable to Parliament. A domestic tribunal, on the other hand, is, in the case of a vocational body, manned by men who have a direct interest in the profession or trade whose supposed interests are being protected. The members of the tribunal are extremely likely to be imbued with that intense conservatism regarding their occupation, that disposition to regard with animosity new methods or a new

<sup>7</sup> *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523.



point of view, which is the normal expression of the professional instinct.<sup>8</sup> They are in nearly all cases entirely uncontrolled, and responsible to no one save their own colleagues; and they are usually accustomed to regard the public interest as of less importance than, or identical with, the prosperity of the members of the trade or craft, so far as the conduct of the vocation is concerned. Frequently the body which creates the offence is the body which tries persons accused of having committed that offence. All this results in decisions which are obviously biased and informed by prejudice. The cases of the medical profession and of certain trade unions have become notorious, to say nothing of a well-known London club which was brought to book in the courts; but these instances are merely symptomatic of a wide-spread disease, which is not likely to be remedied until the decisions of such bodies are made subject to review by the courts of law.

#### SOME CONSTRUCTIVE PROPOSALS

We may return now to our main discussion regarding the bodies which are concerned in administrative justice. 'When', observes Dean Roscoe Pound, 'putting aside the fictions of legal tradition, we look squarely at what actually takes place in the judicial and juristic development of legal materials, we need not fear for constitutional liberty because the commissions to which the application of so many legal standards is now committed do not proceed by the exact and certain methods of legal logic.'<sup>9</sup> He was referring to American institutions, but the same may be said, in my opinion, regarding the extensive group of administrative tribunals which now exists in England. I do not myself regard the existence of the well-defined

<sup>8</sup> Cf. Graham Wallas, *Our Social Heritage*, Chapter on 'Professionalism'.

<sup>9</sup> Roscoe Pound, 'The Administrative Application of Legal Standards', 44 *American Bar Association Reports*, p. 462.

body of administrative law which now exists in England with antagonism, or feel apprehensive at the prospect of its almost inevitable extension and development in the near future.

There are, however, a number of questions which call for serious consideration if administrative law is to develop with advantage and safety, and certain principles need to be followed if the constitutional system of English government is to proceed on an intelligible plan.

The first matter to which I would draw attention is the lack of principle which has been manifested by Parliament in naming the appellate body to which a citizen must go for redress. There is no clear distinction drawn between the class of case which is to be decided by the courts of law and that which goes for determination to one of the central departments of Government. In some cases two alternative procedures are provided for the same class of question. Thus, with regard to the making up of private streets at the expense of the owners, if a local authority acts under the Public Health Act, 1875, an appeal lies by the owner to the Minister of Health; if it acts under the Private Street Works Act, 1892, a dissatisfied owner must appeal to the local justices of the peace. In other cases, notably in the Housing Acts and the Public Health Acts, the Legislature, in a single statute, has appointed a Government department to be the tribunal under certain sections and the courts of law to be the appellate body under other sections.<sup>1</sup> An even more chaotic position exists in regard to appeals from the decisions of the district auditor. Where the amount involved is less than £500, concurrent powers are possessed by the High Court and the Minister of Health, and an aggrieved person can seek redress either from the judicial

<sup>1</sup> Cf. F. H. C. Wiltshire, 'The Appellate Jurisdiction of Central Government Departments', *Journal of Public Administration*, Vol. 2, No. 4, October 1924

court or the administrative authority. No clear principle emerges from the existing legislation, which is inconsistent and haphazard.

I venture to suggest that attention might usefully be paid to the following principles in connection with the powers and jurisdiction of administrative tribunals.

(1) Where a new policy of social improvement is to be carried out by the central executive or local governing authorities of a kind which involves interference with private rights of property or personal freedom, it is desirable, in the interests of administrative efficiency and social progress, that judicial functions occurring in connection therewith should be dealt with by an administrative tribunal. This applies particularly to controversies arising through the obstructive resistance offered by vested interests to the execution of the scheme.<sup>2</sup> A typical example of a service falling under this heading is town and country planning.

(2) Where it is desired to create new standards rapidly in a hitherto unexplored field, jurisdiction should be given to an administrative tribunal. The degree to which the administrative and the judicial enter into issues differs much in different classes of cases; and this fact provides some guidance as to the kind of appeal which should be provided. It varies to some extent according to the degree to which definite standards have been formed by instructed opinion. Thus, in the case of an ordinary nuisance, the standard is so definite that the judicial element predominates; it is less in the ascendant in such cases as the standard of repair to which a private street should conform; and still less on the point whether a cinema should be allowed in a residential district.<sup>2</sup> When the National Service Acts were passed the concept of

<sup>2</sup> 1 G. Gibbon, *Journal of Public Administration*, October 1924.

exceptional hardship was entirely vague and could not wisely have been left to the slow and uncertain process of judicial formulation.

(3) Where new or existing standards are to be applied or extended throughout the country, it is desirable to confer power to decide controversies arising in connection therewith on an administrative tribunal. A greater consistency of treatment and co-ordination of results is to be anticipated from a single central tribunal than from a group of courts whose decisions are not co-ordinated in an organised fashion on questions of fact. Where it is desired that allowance should be made for local custom and variations in the standard of living in different areas, it is better to let the matter go to the courts of law.

(4) Where the correctness of the decision must depend to an appreciable extent on special knowledge, or information of a kind likely to be available only within the precincts of a government department, an administrative tribunal should be set up either within that department, or with access to the departmental archives, to deal with the matter in preference to the courts.

(5) Although administrative justice is generally cheaper and more rapid than the ordinary judicial process, and while those advantages may be of essential importance in certain fields, the need for cheapness and speed is not in itself sufficient to justify the supersession of the courts of law by administrative tribunals. Much could be done to make the ordinary business of litigation more rapid and less expensive to the parties than it is at present, and it is preferable that the courts of law should be improved in these respects rather than that judicial functions should be conferred on administrative bodies merely in order to attain those ends. But much more drastic action will be required than anything which is likely to emerge from the half-hearted and desultory

efforts in this direction made at infrequent intervals by the legal profession and the judiciary.

(6) Administrative law may sometimes deal with controversies of a type already dealt with by the ordinary courts of law; but as a general rule it should be confined to affairs which are beyond the frontiers of the existing body of law. Administrative tribunals should normally be concerned only with matters in which the State has intervened in some way or other, either by way of regulation or the provision of a service. Hence, in most controversies to be decided by such tribunals at least one of the parties will usually be a public authority. Disputes between subject and subject should usually go to the courts of law in the ordinary way.

(7) Where an administrative body is given judicial functions it should have power to act as the tribunal of first instance. If it is only permitted to hear appeals, and is unable to exercise control over the case in its early stages, it may be impossible to safeguard the ends of justice.<sup>3</sup>

It may be convenient if I recapitulate shortly the

<sup>3</sup> Under the National Health Insurance scheme, the original Commissioners (and later the Minister of Health) were empowered to hear claims for benefit made by insured contributors against the approved societies of which they are members, only by way of appeal *after* the case had been decided in the first instance in accordance with the rules of the particular approved society concerned. Parliament intended, in making the Commissioners the final court in these questions, to leave to the approved societies the right to act as courts of first instance, while reserving to the insured person a right of appeal which would not involve him in the expense incidental to proceedings in a court of law. But under this system insured persons have had great difficulty in getting proper information as to their rights of appeal, greater difficulty in finding the money required to prosecute an appeal, and still more difficulty in getting a fair hearing before the tribunal of first instance—that is, the approved society.

Although most approved societies have adopted the Ministry's model rules and procedure in this direction, and thereby acquired a measure of uniformity, there remains a bewildering diversity of practice among some of the most important societies in regard to such matters as the time limit for lodging an appeal, the number of tribunals through which a case must be taken before an appeal lies to the Ministry, the amount of deposit which must be paid by a complainant, and the constitution of the tribunal.

The result of all this is that although the system of legal referees,

other recommendations of a practical nature which I have made during the course of the earlier chapters.

(8) Administrative justice should in all cases be carried on by definite tribunals consisting of public servants or other persons specially nominated for the purpose by the responsible Minister. In no circumstances should judicial functions be left to remain in hotchpotch with the ordinary executive duties of a central department.

(9) Such tribunals should invariably give an aggrieved party the right to an oral hearing if he desires to have one. The hearing should as a general rule be open to the public,<sup>3a</sup> and, if possible, take place in special rooms set aside for the purpose.

(10) Administrative tribunals should have power to call for documents and compel the attendance of witnesses; and where an oral hearing is asked for, the evidence should be given in person rather than in writing.

(11) Administrative tribunals should in all cases be required to give reasoned grounds for their decisions, to enunciate as far as possible the principles which they are following, and to publish reports of their decisions.

(12) Great attention should be paid to the quality of the personnel of administrative tribunals. The organs of administrative justice may require to be manned by a new type of adjudicator who will combine a knowledge

appointed by the Minister of Health to hear appeals, works well in practice, a very large number of cases which ought to reach the Ministry in its capacity as a Court of Appeal fail in practice to get there. This would have been avoided if the administrative tribunal in question had some control over the case in its early stages; above all, if the case came before the Minister for its first hearing, and not by way of appeal against a decision of the domestic tribunal. Cf. Evidence of Sir Walter Kinnear before Royal Commission on National Health Insurance, Q. 454 and Q. 23,750, p. 1155.

<sup>3a</sup> Both the public and the press are admitted to the hearings of Reinstatement Committees, but far too many administrative tribunals sit in secret.

of law with a thorough training in economics and the social sciences. The scales of remuneration for the members of administrative tribunals are far too low in many instances to attract properly qualified personnel and should be reconsidered. The psychological requisites for the formation of good judgment call for separate consideration, however, and the traditions of the English judiciary provide a valuable object-lesson in this respect.

(13) Where interference with existing rights of person or property, of a kind likely to arouse powerful antagonism, is contemplated by a government department, the authority of an administrative tribunal set up to adjudicate in disputes arising therefrom should be strengthened by an infusion of independent or representative members from outside. Representation on the tribunal of the interests affected is specially necessary where (a) a voluntary submission to its jurisdiction is desirable, or (b) the effective enforcement of its specific decision is impossible without the co-operation of the parties concerned.

(14) The person or persons who inquire into the facts should, in every case, also decide the issue. The disintegration of the judicial function among several individuals in a single department, or among several committees or groups, which sometimes occurs at present, is highly undesirable and unscientific. The maintenance of the necessary unity in this connection is not incompatible with the utilisation and pooling of official knowledge gathered by a department from various sources.

(15) The principles which it is desired that an administrative tribunal should apply, or the policy it should follow, should (unless laid down by statute) in all cases be definitely formulated and publicly declared in regulations, directions or a Letter of Reference from the responsible Minister to the members of the tribunal. The

control exerted by the Minister over the work of the tribunal should be exclusively confined to instructions contained in public documents of this kind.

(16) In all cases where the subject-matter of the dispute is important, a right of appeal should normally lie to a superior administrative appeal tribunal, whose decision should be final.

(17) It is desirable that the members of administrative tribunals should be personally liable for damages in the courts of law wherever malice or negligence or corruption, or fraud could be proved against them in their official capacity. It would therefore be a good thing if the tendency to limit the application of the principle of judicial immunity to members of formal courts of law were preserved and strengthened.

The scope of judicial privilege is by no means clear at present.<sup>4</sup> It applies to any authorised inquiry taking place before a tribunal which, though not a court of justice, has similar attributes.<sup>5</sup> The doctrine of judicial immunity from legal liability has been extended to a military court of inquiry<sup>6</sup>; to a coroner's court; the Disciplinary Committee of the Law Society; and to a private commission appointed by a bishop under statute to inquire into the inadequate performance of ecclesiastical duties and to report whether scandal or inconvenience would result from a particular incumbent continuing to perform the church services. In consequence, absolute privilege attached to statements made by witnesses before this commission though they were not given on oath.<sup>7</sup> On the other hand, a Commissioner appointed under the Canadian Combines Investigation Act was held not to be

<sup>4</sup> R. M. Jackson, *The Machinery of Justice in England*, p. 287.

<sup>5</sup> *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. at p. 442 (Lord Esher).

<sup>6</sup> *Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255.

<sup>7</sup> *Barratt v. Kearns*, [1905] 1 K.B. 504.



entitled to the absolute privilege of a court and might be liable to an action for slander if express malice were proved.<sup>8</sup> A more important decision placed Courts of Referees appointed under the Unemployment Insurance Act, 1920, in a similar position. Hence communications made to a Court of Referees are not absolutely privileged.<sup>9</sup>

The rule that judicial immunity applies to the proceedings of every tribunal possessing attributes similar to those of a court of justice is by no means clear or easy to apply. The courts have admitted that the principle is not capable of very precise limitation,<sup>1</sup> since the functions of some tribunals bring them near the line on one side or the other. The mere fact that an administrative tribunal or other authority has to decide issues fairly and impartially, or to bring to bear a judicial mind on its work, does not suffice to entitle either the members of the tribunal or persons appearing before it as parties or witnesses to plead judicial immunity.<sup>2</sup> But it is difficult to say how much more is required.

In a matter of such importance the existing degree of uncertainty is most undesirable.

(18) Administrative tribunals should in all cases be required to exercise a judicial discretion, in the special sense in which that term has come to be understood. Where proof is given that the tribunal has not decided a case with an open mind, or has attempted to further unauthorised purposes, or has been influenced by sinister motives or extraneous considerations, its decision should be open to review by the courts of law, and liable to be quashed (the burden of proof in all cases lying on the party alleging a lack of judicial discretion). With this exception, the system of administrative tribunals should

<sup>8</sup> *O'Connor v. Waldron*, [1935] A.C. 76.

<sup>9</sup> *Collins v. Henry Whiteway & Co.*, [1927] 2 K.B. 378.

<sup>1</sup> *T.L.R.* 125.

*Collins v. Henry Whiteway & Co.*, [1927] 2 K.B. 378.

remain independent of the courts of law and their determinations be free from liability to review, save on purely technical grounds such as lack of jurisdiction or want of 'natural justice'.

(19) Domestic tribunals should definitely be made liable to control by the courts of law. The present practice, whereby they are only called upon to fulfil the requirements of 'natural justice', scrutinises the shadow but leaves the substance of the decision untouched. Frequent and serious injustice results from this situation. The only chance of a real improvement would be if the decisions of such bodies were in all cases made subject to review by the courts, on questions of fact as well as questions of law.

#### A MATTER FOR PARLIAMENT

These recommendations were first put forward tentatively in 1928 in almost exactly the form in which they appear now, except for a few amplifying remarks. Since then the Committee on Ministers' Powers has reported; we have had a spate of legislation setting up new administrative tribunals or conferring additional powers on those which already existed; and much further experience has been gained of how administrative justice works in practice. But nothing has occurred which makes me believe that my original proposals require substantial change.

I am greatly fortified in my convictions by an article entitled 'Tribunals for Conscientious Objectors and Administrative Law', by Mr. R. S. W. Pollard, a practising solicitor, which appeared in 1944.<sup>3</sup> Mr. Pollard analyses with great care the institutional and procedural characteristics of the Conscientious Objectors' Tribunals, and observes that they fulfil in a remarkable degree the

<sup>3</sup> *Public Administration*, Vol. <sup>xx</sup>, No. 2.

principles which I have formulated as desirable. Some improvements could be made in these tribunals, he says, but, 'generally speaking, they are much in advance of other administrative tribunals. For instance, under the Unemployment Insurance Acts, hearings are in secret, and there is no right of audience for lawyers as such. Similarly with cases before Hardship Committees. Local Appeal Boards under the Essential Work Orders only have power to make recommendations. It is curious that conscientious objectors alone have the benefit of good standards of practice. Should they not be applied to all administrative tribunals . . . The purpose of this article is to urge that this experiment should not be forgotten, that the experience of Conscientious Objectors' Tribunals has shown that Dr. Robson's principles are sound and can be applied, that other administrative bodies exercising judicial or quasi-judicial functions should be remodelled in accordance with these principles, and that all future statutes and regulations providing for administrative tribunals should have regard to them'.<sup>4</sup>

Whether any attention is given to improving the present position depends largely on Parliament. Hitherto the Legislature has shown itself to be somewhat indifferent towards administrative tribunals. Its lack of attention to this subject contrasts strongly with its deep and continuing interest in the exercise of legislative powers by Ministers. There have been several full-dress debates on delegated legislation, and important reforms have been obtained in the practice of the Departments and in Parliamentary procedure. A Select Committee of the House of Commons has been appointed solely for the purpose of scrutinising orders and regulations with the object of

1. *cit.*, p. 104.

drawing the attention of members to unusual or objectionable features in them which might call for criticism.

By contrast, there has been little discussion in either House on the subject of administrative justice. There are obvious reasons why Parliament should be more interested in delegated legislative power, for this closely affects Parliament's own functions, but this cannot justify the almost total indifference of Parliament towards a matter of such large constitutional and practical importance. No doubt the fact that by and large administrative tribunals perform their duties in a manner which gives a fair degree of satisfaction to those affected by their decisions, has served to prevent public attention being focused on them in the Parliamentary arena.

Nevertheless, Parliament would do well to be more alive to the issues involved in this sphere of public affairs, both as regards legislative policy and the current work of administrative tribunals. Ministers might be asked to present much more information than they do at present on the organisation, composition, procedure and work of administrative tribunals of all kinds. Some interest might be taken in the qualifications of the personnel of these organs, the conditions of appointment and their scales of remuneration. Publication of decisions is another point on which Parliament might keep a watchful eye.

But above all else, Parliament should attempt to resolve the lack of system in the mass of administrative tribunals. The general legislative trends which have emerged during the past fifteen years appear to be for the most part desirable ones, with certain exceptions; but this does not preclude a most disorderly array of tribunals of all kinds from littering the ground. There seems to be no principle in operation to determine the type of tribunal chosen; the composition of its membership; the method of appointment; tenure of office; the powers

conferred upon the tribunal; the appellate body, if any, to which appeals may be brought; and cognate matters.

I have considered the possibility of classifying the administrative tribunals described in Chapter 3, but have abandoned the attempt as unlikely to produce results worth the trouble. The classification would have to be so elaborate as to be almost useless; and it would not succeed in reducing the complex phenomena to scientific order. It would have to take into account not only the constitution of the tribunal, but also its powers, procedure and principles.

An illustration of the difficulty is given by Dr. R. M. Jackson in his suggested division of administrative tribunals into three groups, consisting of (1) those so constituted as to be independent of the executive; (2) those dependent upon a Minister; (3) those which are formally dependent but in practice independent. The distinction between the second and third group, writes Dr. Jackson, only means that some officials are told what to do or have their work supervised, while others are left free to do as they think best. 'Hence the distinction is unworkable, for as soon as a Minister leaves an official unsupervised we must call him "in practice independent"'. Where there is no institutional form to secure independence the question of "dependent" or "independent" cannot be answered without intimate knowledge of administrative practice' which is often impossible to obtain.<sup>5</sup> The same writer also emphasises the many methods of appointment to office which exists for members of administrative tribunals (which he prefers to call special tribunals). The Registrar of Friendly Societies is appointed by the Treasury. The Traffic Commissioners, the national insurance tribunals and many other adjudicating officers

<sup>5</sup> R. M. Jackson, *The Machinery of Justice in England*, pp. 290-291.

are appointed by a Minister. The Road and Rail Traffic Appeal Tribunal is appointed by a Minister after consultation with other Ministers. The Railway Rates Tribunal is appointed on the joint recommendation of three Ministers. The Special Commissioners of Income Tax are administrative officials appointed to act in that capacity by the Treasury. The Chairmen of Independent Schools Tribunals are appointed by the Lord Chancellor while the other members are appointed by the Lord President. The National Insurance Commissioner and his deputies are appointed by the Crown. A High Court Judge is appointed to preside over the Royal Commission on awards to inventors.<sup>6</sup> A great deal of the diversity in matters of this type is probably due to the fact that each tribunal has been dealt with as a special case without regard to general principles.

In this respect the position in Britain closely resembles that which exists in the United States. There are, in the Federal Government, at least nine different types of administrative tribunals, comprising independent administrative courts, special administrative courts located within departments, regulatory commissions, executive bodies, administrative authorities, licensing organs, the Comptroller-General, regular courts exercising the functions of administrative tribunals, and fact-finding authorities.<sup>7</sup>

There are, moreover, in the United States, great differences in the organisation of these authorities, in the method of appointing their members, in their terms of office, in the size of the organ, its constitutional and legal position, its relationship to other bodies and the manner in which it operates. 'In a word, there is complete

<sup>6</sup> *Ibid.* p. 288.

<sup>7</sup> F. F. Blackly and M. E. Ostman, *Administrative Legislation and Adjudication* (Brookings Institution), p. 121.

confusion in respect to the organisation of the function of administrative adjudication.<sup>8</sup> Professor and Mrs. Blachly, of the Brookings Institution, state that with a little care and thought these institutions could be reorganised in a way which would reduce and simplify the number of types, introduce order and system into their procedures, provide proper appeal tribunals, and generally improve the efficiency with which the work of administrative adjudication is performed.<sup>9</sup>

The methods of procedure of American administrative tribunals are in a similar state of confusion.<sup>1</sup> The variety is so great as to defy classification or even summarisation. A similar lack of system exists in regard to the manner of enforcing their decisions, in regard to which the methods used are at times 'confused, inconsistent and round-about'.<sup>2</sup> Nor is the position any better in regard to control over the actions or decisions of these bodies.<sup>3</sup> In the result, declare Professor and Mrs. Blackly, 'No ordinary citizen, unversed in the intricacies of the special law governing the matter which interests him, can possibly find his way through the maze of forms and procedures, varying from department to department, and even from bureau to bureau, which characterise administrative adjudication in the United States. A clear recognition of the significance of this great function, and a serious effort to have it carried out by means of simple, adequate and consistent forms, are fundamental requisites of progress'.<sup>4</sup> An improvement in these matters will doubtless be effected by the Administrative Procedure Act, 1946.

The position in Britain is sufficiently bad to call for

<sup>8</sup> *Ibid.* p. 159.

<sup>9</sup> Page 162.

<sup>1</sup> *Ibid.* p. 163.

<sup>2</sup> *Ibid.* pp. 163, 175. There are at least ten different methods in use.

<sup>3</sup> *Ibid.* pp. 179, 201.

<sup>4</sup> *Ibid.* p. 119. See also the Final Report of the United States Attorney-General's Committee on Administrative Procedure.

improvement. A movement in the direction of rationalisation and simplification must come, in the first instance, from Parliament.

#### CONCLUSION

What the future holds for the development of administrative justice in England it is impossible to predict, save that a considerable extension of its scope and power is almost certain to be brought about in the near future. The age in which we live is pregnant with social unrest, and the air is burdened with the note of economic conflict. At a time when the very foundations of civilised society are being questioned, when rapidly changing ideas are shifting the allegiance of men and women from traditional conceptions and established institutions in every department of life—political, international, domestic, economic, religious, scientific, artistic—it would be strange indeed if the law had gone unscathed. Nor has it escaped, as the facts which I have surveyed in the foregoing pages bear witness.

The particular aspects of change with which I have here been concerned are only a part of greater changes which have either already taken place, or are likely to take place in the near future, in the legal and constitutional framework of Great Britain. But they are extraordinarily significant. They betoken a loosening of the rigid system of inflexible private rights, enforceable in the courts of law almost regardless of social consequences, which for centuries had been gradually consolidating. If the day of the omniscient sovereign State is at an end, and the absolute power which was claimed for it become converted into a limited authority conditional upon the moral adequacy and practical success of its efforts,<sup>5</sup> no less certain is it that the absolute validity and legal sovereignty of individual

<sup>5</sup> H. J. Laski, *Grammar of Politics*.



rights is also passing away. That, indeed, is the essential meaning of the body of administrative law whose development I have traced in the preceding pages. Absolute rights of property and contract, of individual activity and personal freedom, enforceable in the courts of law regardless of urgent social needs have given way to qualified rights conditional on the extent to which they are compatible with the common good, as interpreted by administrative authorities exercising judicial power.

That power may, in practice, be exercised wisely or unwisely. The results may be good or bad. But there is an immense change in social outlook, no less than in constitutional development, underlying the pedestrian legislative enactments which I have described and discussed in detail. In no country in the world is the traditional veneration for customary methods and conventional channels of legal procedure stronger than in England. In no country does the judiciary stand in such high public esteem. The definite breakaway from the normal methods and machinery of the law which has taken place during the past half-century is accordingly all the more significant of deep-rooted and fundamental change.

The judicial power which has been given to administrative bodies will, I believe, be exercised wisely, and the results are likely to be good. After surveying the facts with all the care and thoroughness in my power, I am convinced that administrative tribunals have accomplished, and are accomplishing, ends which are beyond the competence of our courts of law as at present constituted.<sup>4</sup> Furthermore, those ends seem to me socially desirable ones which compare favourably with the selfish individual claims based on absolute legal rights to which the formal courts are so often compelled to lend ear. I believe that administrative law as it has developed in modern England is filling an urgent social need which is

not met by any other branch of the law; and that there is no inherent reason, if due care and foresight are exercised, why it should be unfitted to take its place side by side with the common law and equity and statute law in the constitutional firmament of the English governmental system. I believe that administrative justice may become as well-founded and broad-based as any other kind of justice now known to us and embodied in human institutions.

Even an unfriendly critic can scarcely ignore the testimony of Mr. Charles Muir in his interesting study *Justice in a Depressed Area*. Most of the authoritative pronouncements on the subject of administrative courts, he points out, are made by men who have had no experience of them and little direct contact with working-class conditions. 'In general, the northern working man appears to regard administrative tribunals, which usually consist of either a civil servant sitting alone or three persons (an independent chairman and two judges representing interests concerned), as fairer and more efficient than the ordinary courts.'<sup>6</sup>

In these pages, however, my object has been to describe and explain its growth and evolution, to understand the causes rather than either to condemn or praise; to suggest methods of improvement rather than to discover reasons for opposition. Administrative justice, I maintain, can no longer be regarded as a foundling child to be avoided and pushed into the street at the first suitable opportunity. It must be accepted as a recognised part of the law. The ultimate purpose of all law is the welfare of society; and for a long time to come administrative tribunals will undoubtedly be the most effective method of securing the welfare of the nation in certain departments of life.

But it is highly desirable that we should be fully

<sup>6</sup> Page 86.

conscious of the whole problem which is presented by the rise of administrative justice in England, properly critical of its defects and awake to its possible dangers. It is my hope that some of those defects may be remedied, and the dangers avoided, by the recommendations of a practical character which I have ventured to make and which are recapitulated briefly in this chapter.

The aim of a sound body of administrative law should be neither to disappoint the reasonable expectations of the possessor of private rights, nor to cripple the free activities of the individual, nor yet again to enable executive tyranny to masquerade under a colourable imitation of judicial sanction. Its aim should rather be to provide effective guarantees that the powers of the State will be wisely exercised in the public interest unfettered by private selfishness, to hold the balance between the claims of extreme autocracy, on the one hand, and extreme legalism on the other.

Whether that task is successfully accomplished will depend in the last resort less on the institutional framework and the statutory power with which administrative tribunals are endowed than on certain psychological considerations to which I have referred in an earlier chapter. Justice cannot be assured by any known device of organisation or legislative formula. It requires for its enthronement the services of men possessing certain inherent qualities, who are capable of scientifically investigating objective facts and of creating and applying ethical standards in the social interest. That is a rare combination of human qualities; but just men have always been rare. The sense of fairness is at bottom an innate personal quality; and there is no formula by which it can be produced.

All we can say is that what may broadly be called the sense of justice appears to be on the increase in many departments of life. In all the fields in which men are

extending the frontiers of knowledge, something is being done to develop the judicial mind. No one can be a good biologist, or competent as an engineer, as a bacteriologist, as a research chemist, as an economist, as a scientist of any kind, without being imbued with a sense of fairness, without possessing, in regard to the subject-matter of his own work at least, some measure of the judicial mind. The modern conception of international comity and economic or social democracy involves, again, in various spheres, the exercise of discretions which shall be 'judicial' or 'reasonable', of power which is not to depend on caprice or personal favour or self-interest. Here once more we have the rudiments of the judicial method of thought. The old waywardness is disappearing; and though with it we may also lose certain qualities of spontaneity and impulsiveness which are precious, we shall gain a nearer approximation to justice among men than has prevailed in the past.

We can, then, look forward to a world in which the ideal of social justice will become increasingly prominent, in which the ability to form an intelligent judgment on men and affairs, and on the phenomena of mind and matter, will become more widespread. Since in such a world judicial habits of mind are likely to grow more and more prevalent in many departments of life, we can surely have reason to believe that the new era of administrative law which the twentieth century has ushered in is not likely to set at nought the fundamental ideas of justice on which the harmonious development of organised society depends.

## APPENDIX

THE Transport Bill, the Electricity Bill and the Town and Country Planning Bill, now before Parliament, contain many clauses which, when they become law, will amend and extend the provisions relating to administrative justice in those fields described in Chapter 3. The following summary refers to the Bills in the form in which they were introduced in the House of Commons.

### *I. Transport Bill.*

Part III (which deals with the transport of goods by road) requires the holders of A and B licences who engage in long-distance haulage operations for hire or reward to be in possession of a permit granted by the British Transport Commission. This is in addition to the licence. Clause 53 (4) enables an original permit to be revoked or suspended by the appropriate licensing authority for the area on being satisfied that the holder has been guilty of a serious breach of any condition attached to the permit or any licence of which he was the holder. Any person who holds a permit granted by the British Transport Commission and is aggrieved by its revocation or suspension by the licensing authority may appeal to the Transport Tribunal. A similar appeal lies by the Commission if they are aggrieved by the refusal of the licensing authority to revoke or suspend a permit. Pending the transfer of its jurisdiction to the Transport Tribunal on the appointed day under Part V, the Road and Rail Appeal Tribunal shall hear any such appeal.

The authority conferred on the Minister of Transport by the Road Traffic Act, 1980, s. 63 (1), to give general directions to the area traffic commissioners is extended to apply to the licensing authorities for goods vehicles, *i.e.*, the chairman of the traffic commission in each region sitting alone. Where a direction has been given by the Minister to a licensing authority under any power which the Minister possesses, the Transport Tribunal shall not, on any appeal brought under the foregoing provisions, require the authority to do anything which would be inconsistent with the Minister's directions.

The requirements of section 1 of the Road and Rail Traffic

Act, 1930, which prohibits the use of goods vehicles in certain cases without a licence, are not to apply to the British Transport Commission though the latter are required to observe a number of statutory conditions applicable to A and B licence holders. The British Transport Commission may apply to the appropriate licensing authority for the revocation, variation or suspension of a licence on any ground which the authority is authorised to consider for that purpose; and the licensing authority must consider the application.

Part IV of the Bill deals with passenger road transport. It excludes passenger road transport services provided by the British Transport Commission, or by any person acting as their agent, from the provisions of sections 72 to 76 of the Road Traffic Act, 1930, which established the jurisdiction of the area traffic commissioners as licensing authorities for this class of transport undertaking. Nevertheless, the route for any such service must be approved by the traffic commissioners for the area; and any restrictions they may impose on the class or description of vehicles to be used must be observed. The British Transport Commission may appeal to the Minister on any of these matters from the decision of the licensing authority and his decision is final.

Part V relates to the Transport Tribunal and transport charges and facilities. The Railway Rates Tribunal is renamed the Transport Tribunal. Its constitution is modified by substituting 'a person of experience in transport business' for the member with experience in railway business required by the Railways Act, 1921. The railway panel of additional members of the Tribunal is similarly widened to include persons who provide or have had experience in the provision of transport services of any kind. It will henceforth be known as the transport panel.

The Road and Rail Appeal Tribunal set up under the Road and Rail Traffic Act, 1933, will be abolished and its jurisdiction transferred to the Transport Tribunal. The Railway and Canal Commission will also be abolished and its powers similarly transferred. Certain powers of the High Court relating to the contravention by a railway or canal company of the provisions of certain enactments will in future also be exercised by the Transport Tribunal. The Tribunal shall, for the purpose of the exercise of any of their functions under this or any other Act 'have full jurisdiction to hear and

determine all matters whether of law or of fact'. They are given all the powers, rights and privileges of the High Court as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of orders, entry on and inspection of property, etc. (Tenth Schedule). The Tribunal may order damages to be paid by any person.

The Tribunal are to report annually to the Minister on all their proceedings. He is to lay the Report before Parliament. The statutory limitation of the size of the Tribunal's staff to ten persons is removed.

As regards charges, the British Transport Commission will from time to time prepare, and submit to the Tribunal for confirmation, draft charges schemes for determining the charges to be made by the Commission and, where necessary, the other terms and conditions applicable to services and facilities (including the liability of the British Transport Commission for loss or damage). A charges scheme may provide for fixed charges, maximum charges or standard charges, and also minimum charges, etc. The obligation to produce an annual yield, equal to the 'standard net revenue' of 1913, laid down by the Railways Act, 1921, has disappeared. The Tribunal can also authorise or require the British Transport Commission to afford special treatment, as respects charges or terms and conditions, to specified classes or persons.

The Bill provides for publication of draft charges schemes, notice and hearing of objections, public inquiry, followed by confirmation, as submitted or subject to alterations, or rejection.

An application to alter a charges scheme which is in force may be made to the Tribunal (subject to certain restrictions as to time) by the British Transport Commission, by a body representing any class of persons using the services or facilities, by an organ set up to administer an industry under national ownership or control (such as the National Coal Board) or by any individual passenger or trader using the services or facilities. A similar procedure is followed as in the case of an original draft scheme.

The Minister of Transport may at any time require the Tribunal to review the operation of a charges scheme. The Minister may also make regulations authorising various trans-

port undertakers to make additional charges in excess of those permitted by statute, but this does not apply to any service or facility covered by a charges scheme.

The annual revision of charges under the Railways Act, 1921, is to be discontinued; and so too will be the general revision of standard charges and fares. Neither the Commission nor the Transport Tribunal may do anything in the exercise of their respective powers as respects charges and charges schemes which will in their opinion prevent the Commission from discharging its duty to secure that their revenue is not less than sufficient to meet expenditure properly chargeable to revenue taking one year with another or which in their opinion will prevent the Commission from giving effect to any direction of the Minister under any provision of the Bill. Furthermore, the duty which is laid on the Commission to give effect to the Minister's directions includes an obligation to submit charges schemes, or alterations in existing schemes, which are required to carry out Ministerial directions.

The Bill contains a number of transitional provisions relating to exceptional rates and fares of the Commission, until these are superseded by charges schemes. The enactments respecting agreed charges are also revised.

Under Part IV of the Bill the Commission may prepare and submit to the Minister (and be directed by him to do so) schemes for the acquisition, management and development of trade harbours. A scheme of this kind may designate the British Transport Commission, acting either alone or jointly with other bodies, as the port authority. It may also set up or designate a licensing authority for the harbour in question; and where this is done, save as may be otherwise provided by the scheme, port facilities shall not be provided in or in connection with the harbour by any person except under and in accordance with the conditions of a licence granted by the licensing authority. A licence may specify conditions as to charges and other matters to be observed by the holder.

A harbour licence may be revoked at any time by the licensing authority. Its duration may be fixed at the discretion of the authority. But the licensing authority may not refuse or revoke a licence, or impose conditions on its grant, unless it is expedient so to do 'with a view to securing the better use of the harbour in the national interest' or its 'economical improvement, maintenance or management'.



The applicant for a harbour licence, or the holder of such a licence, may appeal to the Transport Tribunal if he is aggrieved by a decision of the licensing authority respecting the grant or revocation of the licence, or the conditions to be attached to it. The Transport Tribunal shall make such order as they think just and proper.

Under Part VIII a Transport Arbitration Tribunal is established to determine certain questions arising in connection with the compulsory acquisition of transport undertakings. Part VII contains provisions relating to pension schemes and pension funds. The Minister of Transport is authorised to make regulations relating to these matters. Clauses 98 (8) and 99 (2) provide that any dispute arising between the Minister and any person as to whether the regulations have achieved the results which are stipulated by the Bill is to be referred to a referee or board of referees appointed by the Minister of Labour and National Service for the purpose.

## *II. Electricity Bill.*

Part I of the Bill provides for the establishment of a national organ to be known as the British Electricity Authority, whose duty it will be to develop and maintain an efficient, co-ordinated and economical system of electricity supply for all parts of Great Britain except the North of Scotland (where the North of Scotland Hydro-Electric Board will continue in existence and exercise the functions of both the central authority and of an Area Board). This national authority will generate or acquire supplies of electricity, and provide supplies in bulk to fourteen Area Boards for distribution in detail by them. It will co-ordinate the regional distribution by the Area Boards and exercise a general control over their policy. It may supply electricity direct to individual consumers, *e.g.*, railways, if required to do so by statute or if authorised by the Minister of Fuel and Power. The constitution and areas of the Area Regional Boards are laid down by the Bill. They are separate corporate bodies whose powers and duties are specified by law.

A Consultative Council will be established for the area of each Area Board. It will be appointed by the Minister of Fuel and Power from among the members of local authorities and representatives of consumers and others interested in the development of electricity.

A Consultative Council will have a duty to consider any matter affecting the distribution of electricity in their area and to notify their conclusions to the Area Board. A Council has the right to make representations to the British Electricity Authority, after consultation with the Area Board concerned, on matters which they have brought to the latter's attention.

The Central Electricity Board will be abolished and all its assets and liabilities transferred to the British Electricity Authority. The new central body will also acquire the assets and liabilities of the power station companies and holding companies, together with all generating stations, main transmission lines, etc., owned by them. All the remaining assets and liabilities of authorised undertakers, whether municipal or company, will vest in the Area Boards, but in the case of a municipal authority only the electricity undertaking will be acquired. Commercial companies which are power companies, holding companies or authorised undertakers will be dissolved.

The Minister may by order provide for dissolving the Electricity Commissioners. An order made for this purpose may transfer to the Minister all the Commissioners' property, rights, liabilities and obligations; and he may in turn retransfer some or all of them to the British Electricity Authority. The Minister may transfer to himself, or to the Central Authority, any functions hitherto exercised by the Commissioners; or he may extinguish those functions.

The Bill provides for the establishment of an Electricity Arbitration Tribunal to hear and determine questions and disputes under Part II, which relates to the acquisition of electricity undertakings and compensation to holders of securities and local authorities.

Clause 48 authorises the Minister of Fuel and Power and the Secretary of State for Scotland to make joint regulations for providing pensions for various categories of persons who have been employed in the electricity supply industry, and for the establishment and administration of pension schemes and funds. These regulations may continue, amend, repeal or revoke existing pension schemes; but they must secure that persons having pension rights are not placed in any worse position by reason of the amendment, repeal, etc. The regulations may contain provisions as to the manner in which questions arising under them are to be determined.

Clause 49 provides that the Minister shall by regulations

require the central authority or any area board to pay compensation to officers of any body whose property, rights, liabilities and obligations are transferred by the Bill to them, and also to whole-time officers who are employed for the purpose of administering the undertaking, where they suffer loss of employment or loss or reduction of emoluments or pension rights. Similar requirements apply to members of the Central Electricity Board and to the Electricity Commissioners and their staff. These regulations may contain provisions enabling appeals to be brought, either as to right to compensation or its amount, to a referee or board of referees appointed by the Minister of Labour and National Service.

### *III. Town and Country Planning Bill.*

This measure introduces a basic reform of the planning system. Part I deals with central and local administration; Part II with powers and procedure in relation to planning and control of development; Part III covers the acquisition and disposal of land for planning purposes; Parts IV and V deal with compensation and betterment; Parts VI, VII and VIII with finance and special contingencies.

The Bill makes county and county borough councils local planning authorities. Joint Planning Boards can be set up for larger areas and Joint Advisory Committees may also be established for two or more planning authorities. A Central Land Board is to be appointed by the Minister of Town and Country Planning and the Secretary of State for Scotland jointly to administer Parts IV and V.

Each local planning authority is required to survey its area and to prepare a development plan showing how it proposes that the land in its area should be used and designating the land likely to be wanted for various purposes within a ten-year period. The plan is submitted to the Minister for approval and he is empowered to give directions to planning authorities as to the manner in which their functions are to be performed. The plan is to be reviewed at least every five years.

Clause 10 provides that permission is to be obtained for any development of land which involves a material change in its use (as defined in clause 11). A system of development

control is established on the lines of the present interim development control.

The Minister may give directions, applying either to a particular local planning authority or generally, requiring that any application for permission to develop land, or all applications of any specified class, shall be referred to him instead of being dealt with by the local planning authority. The powers and duties of a local planning authority then apply to the Minister in respect of an application referred to him in this way. Before determining the matter the Minister is obliged, if either the applicant or the local planning authority so desire, to afford to each of them an opportunity of appearing before and being heard by a person appointed for the purpose by the Minister. The Minister's decision on the application is final.

By clause 14, an applicant who is aggrieved by the decision of a local planning authority has a right of appeal to the Minister. The decision may consist of a refusal to permit him to develop land, or a grant of permission subject to conditions which are unacceptable to him, or the withholding of approval in regard to some matter which is required under a development order. The Minister is not to be required to entertain an appeal in respect of an application to develop land if it appears to him that permission for that development could not have been granted by the local planning authority or could only have been granted subject to the conditions imposed by them, having regard to the provisions of the Act and of the development order made thereunder. Where an appeal is brought under this clause, the Minister may allow or dismiss it; or he may reverse or vary any part of the decision of the local planning authority, whether or not the appeal relates to that part, and deal with the application as though it had been made to him in the first instance. The Minister can thus act as a tribunal of first instance or as an appellate body, but the applicant can only bring the matter before him after the local planning authority has given its decision.

If any person by whom an application is or could be made under Part I for permission to develop wishes to have it determined whether the carrying out of any specified operations, or the use of land for a particular purpose, amounts to development within the meaning of the Act, he is entitled to apply to the local planning authority for a decision on that

point, either as a separate question or as part of an application to develop. A similar right of appeal lies to the Minister; but a proviso declares that the Minister's decision that the proposed operations or use involve development shall not be final for the purposes of any appeal to the Court under Part I of the Bill relating to planning control.

Comprehensive regulations may be made under clauses 28-29 in order to establish a national code of control over outdoor advertisements, within the broad framework of the planning system, having regard both to the interests of amenity or of public safety. The regulations may require advertisers to obtain the consent of the local planning authority for the display of advertisements and for an appeal to be brought from their refusal to an independent tribunal to be constituted for the purpose.

Under the Bill all development rights in land will be acquired from the present owners and vested in the State. The Central Land Board will settle and receive development charges in respect of any land development for which permission is required from the planning authorities. Part VI, which deals with the application of these arrangements to special cases, provides (by clause 77) for land held by local authorities for general statutory purposes; for land acquired by local authorities and development corporations for comprehensive development or re-development (clause 78); and for land held for charitable purposes (clause 80). Clause 86 declares that any question whether land is land to which these provisions apply shall be determined by the Minister.

Clause 94 authorises the Minister to make regulations to effect the transfer of property and officers from county district councils, which were planning authorities under the previous legislation, to county councils or Joint Planning Boards. These regulations may provide, *inter alia*, for the determination of questions arising in relation to the matters dealt with in the regulations, which may include the payment of compensation to officers suffering loss of employment or diminution of emoluments, transfer of property and liabilities of county district councils, etc.

Except in so far as may otherwise be provided by regulations made under the Bill, any question of disputed compensation (apart from that payable in respect of compulsory acquisition of land) will be determined in the same

manner as that laid down by the Acquisition of Land (Assessment of Compensation) Act, 1919. Any dispute as to what is the use which prevails generally in the case of contiguous or adjacent land shall, on application being made by any party to the dispute, be referred to and determined by the Central Land Board. A right of appeal lies from the Board to the Minister, whose decision is final (clause 101).

Clause 96 (2) enacts that the provisions of the Bill and of any regulations made under it, requiring the Minister to consider objections or representations, or to hold local inquiries or other hearings in relation to any matter which he is authorised or required to determine, 'shall not be construed as precluding the Minister from considering any other circumstances which appear to him to be material, or as restricting the right of the Minister to consult at any time with the local planning authority, or with any other authority or person (whether or not being one of the persons by whom such an objection or representation was made, or who were parties to any such inquiry or hearing) before determining that matter'.

Repeals include the Town and Country Planning Act of 1932, the Town and Country Planning (Interim Development) Act, 1933, and most of the Town and Country Planning Act, 1944.



## INDEX OF NAMES

- Abbott (Lord) (Chief Justice), 19  
 Adler (H. M.), 305 n.  
 Allen (C. K.), 339, 367 *et seq.*, 370,  
     399, 441 n., 448  
 Alverstone (Lord), 10, 288  
 Amos (Sir M.), 71  
 Amulree (Lord), 489  
 Anderson (Sir John), 317, 331, 333  
     *et seq.*, 357  
 Archbold (J. F.), 20  
 Ashley (W. W.) Colonel, 488  
 Atkin (Lord), 56, 59
- Baker (C.), 208  
 Bacon (Francis), 10, 478  
 Bent (E.), 46  
 Bentham (Jeremy), 66, 75, 257, 274  
 Berthélemy (L. J. B. H.), 27 n.  
 Beveridge (Sir W.), 117, 176  
 Blachly (F. F.), 437, 511-12  
 Blackburn (Mr. Justice), 54  
 Blackstone (Sir W.), 19, 40  
 Blanesbrough (Lord), 179  
 Bowen (Lord Justice), 230  
 Bowley (A. L.), 279, 284  
 Brandeis (Mr. Justice), 445  
 Branson (Mr. Justice), 395  
 Brett (Lord Justice), 10, 377  
 Buckmaster (Lord), 43  
 Burke (Edmund), 308  
 Burns (C. Delisle), 279
- Campbell (Lord), 449, 451  
 Cardozo (B. J.), 262, 268, 295, 304,  
     310, 351, 415 n.  
 Carr (Sir Cecil T.), 32 n., 62, 272,  
     276, 353, 354, 437, 446, 452  
 Channell (Mr. Justice), 48  
 Chardon (E. H.), 27 n.  
 Charles (Mr. Justice), 56, 298  
 Chester (D. N.), 100  
 Childers (Rt. Hon. Hugh), 414 n.  
 Cockburn (Ch. Jus.), 299  
 Coke (Ch. Jus.), 40, 48, 280  
 Collins (Sir Ric.) (M.B.), 60  
 Cowcher (W. B.), 296 n.  
 Crompton (Mr. Justice), 47  
 Croom-Johnson (Mr. Justice), 400  
 Cushman (R. E.), 100, 106, 107,  
     211, 244, 438 n.
- Dawson (R. M.), 41, 45, 50 n.  
 De Lanbaddre ( ), 27 n.  
 Dewey (J.), 262, 282 n.  
 Dicey (A. V.), 16 n., 26, 27, 28, 35,  
     51, 78, 258 n., 342, 369, 379,  
     380 n., 384 n., 429, 443, 462, 463  
 Dieudonné ( ), 27 n.  
 Dillon (J. F.), 304 n.  
 Dodd (W. F.), 200  
 Dodson (J. F.), 457  
 Donoughmore (Earl of), 326  
 Ducrocq (L.), 27 n.  
 Duguit (L.), 27 n., 51  
 Duncomb (G.), 77 n.
- Eliot (G.), 76 n.  
 Esmein (A.), 27 n.  
 Eve (Mr. Justice), 173, 232
- Farwell (Lord Justice), 136  
 Fisher (Sir Wm.), 317  
 Forbes (E.), 372  
 Freund (E.), 82 n., 294 n., 328, 483
- Gény (F.), 282, 284  
 Ghose (N.), 51 n.  
 Gibbon (I. G.), 17, 22, 468 n., 500 n.  
 Gladstone (W. E.), 289  
 Goodnow (F. J.), 12 n., 14, 17 n.,  
     87 n.  
 Gordon (D. M.), 11, 349, 353  
 Gray (J. C.), 67  
 Greene (Sir Wilfred) (M.B.), 9  
 Greer (Lord Justice), 402  
 Gregory (Judge Holman), 180  
 Griffith (Sir W.), (Ch. Jus.,  
     Australia), 7  
 Gwyer (Sir M.), 318, 321, 325, 452
- Haldane (Lord), 20, 65, 256, 381,  
     382  
 Halsbury (Lord), 14 n., 21 n., 39 n.,  
     49, 53, 55, 73, 77 n., 239, 275,  
     278 n., 289 n., 294, 296 n., 305 n.,  
     306 n.  
 Hamilton (A.), 286  
 Hand (Judge Learned), 272  
 Harcourt (Sir Wm.), 290



- Hariou ( ), 27 n.  
 Hart (W. E. & W. O.), 43  
 Haslam (A. L.), 222  
 Henderson (G. C.), 58, 59, 71, 274, 437 n., 466  
 Herschell (Lord), 6, 67, 235  
 Hewart (Lord), (Ch. Jus.), 29, 314, 338, 347, 360, 368, 371, 387, 391, 493 n.  
 Hill (Mr. Justice), 445  
 Hill (H. A.), 340  
 Hobhouse (L. T.), 41 n., 268 n., 301 n.  
 Holdsworth (Sir Wm.), 14, 16, 48 n., 49 n., 317  
 Holmes (O. W.) (Judge, U.S.), 293  
 Hoover (H.), 472  
 Hume-Williams (Sir E.), 320, 329, 335  
 Humphreys (Mr. Justice), 407  
  
 Inderwick (F. A.), 16 n.  
  
 Jackson (R. M.), 309, 327, 505 n., 510  
 Jacob (G.), 15 n., 39 n., 295 n.  
 Jacquelin ( ), 27 n.  
 Jenks (E.), 17 n., 40 n., 75 n., 76 n.  
 Jennings (W. I.), 823, 337, 346 n., 352, 364, 371, 373, 391, 394  
 Jervis (Ch. Jus.), 450 n.  
 Jèze (G.), 27 n.  
 Johnson Davies (K.C.), 225  
 Jones (W. H.), 243  
  
 Kay (Lord Justice), 47  
 Keynes (J. M.), 81, 280 n.  
 Kinnear (Sir W.), 128 n., 503 n.  
  
 Laferrière ( ), 27 n.  
 Landis (J. M.), Prof., 211, 216, 431 n., 437 n., 438 n., 444 n., 446-7, 453, 475, 481 n.  
 Iaski (H. J.), 15 n., 317, 366, 449 n., 461, 513  
 Leishman ( ), 128  
 Lippmann (W.), 286 n., 309  
 Locke (J.), 52  
 Loreburn (Lord), 379, 382  
 Lowell (A. L.), 29  
 Lumley (W. G.), 59 n.  
  
 MacAlister (Sir D.), 311  
 McClintock (H. L.), 269 n., 432 n., 440, 442 n.  
 Mackenzie (Sir Wm.). *See* Amulree.  
 MacQuarie (L.) (Govr. N.S.W.), 46  
 Madden (J. J.), 106  
 Maitland (F. W.), 17 n., 25, 52, 300  
 Malinowski (B.), 258  
 Marriot (Sir J. A. R.), 14, 29, 30  
 Masterman (C. F. G.), 463 n.  
 Mathew (Mr. Justice), 378  
 Matthews (J. B.), 305 n.  
 Maude (Sir John), 322, 325  
 Maugham (Lord), 394  
 May (Sir T. E.), 41 n., 50  
 Megarry (R. E.), 278, 403 n., 457 n.  
 Mellor (F. H.), 5, 54  
 Mersey (Lord), 155  
 Moller (W. H.), 305 n.  
 Montesquieu ( ), 18  
 Morgan (J. H.), 32  
 Morris (Sir H.), 179  
 Morrison (H.), 488, 492  
 Moulton (Lord), 256, 299, 382  
 Muir (C.), 515  
  
 Oatman (M. E.), 437, 511 n.  
  
 Passfield (Lord). *See* Webb (S.).  
 Pearson (Karl), 285  
 Phillips (M.), 46  
 Pillsbury (W. H.), 15 n., 216 n., 431 n., 440 n., 442 n.  
 Plowden (E.), 77  
 Pollard (R. S. W.), 456, 507  
 Pollock (Sir F.), 35, 56 n., 222, 242, 254, 257, 268, 462  
 Port (F. J.), 314  
 Pound (Roscoe), 16, 31, 35, 78, 257 n., 263 n., 267, 280, 317, 390, 428, 436, 438 n., 445 n., 461 n., 498 n.  
  
 Raulston (Judge, U.S.), 311  
 Roberts (C.), 465  
 Robertson (G. S.), 5  
 Robinson (Sir A.), 322, 325  
 ——— (G.), 32 n., 53  
 Robson (W. A.), 100, 138, 197, 243, 262 n., 267 n., 272 n., 359, 465 n., 489 n., 508  
 Roche (Mr. Justice), 121  
 Romer (Lord Justice), 389  
 Rosenberg (J. N.), 80 n.  
 Russell (F.), 47 n., 65 n., 72 n., 257 n.  
 Russell of Killowen (Lord), 389

- Sankey (Lord), 7, 8  
 Sargant (Lord Justice), 411  
 Schuster (Sir C.), 33 n., 256, 317, 330  
 Scott (Lord Justice), 58, 340, 398, 402  
 Scrutton (Lord Justice), 11, 309, 387  
 Shaw (Lord) of Dunfermline, 383, 463  
 Short (F. H.), 5, 54  
 Simon (Lord), 242  
 Simonds (Lord), 334, 340  
 Simpson (A. H.), 21, 287 n.  
 Slessor (Sir Henry), 208, 398  
 Smith (A. L.), 57  
 — (H. A.), 222  
 Stamp (Sir J.), 12, 260 n., 261, 280 n.  
 Stanley (Lord), 450 n.  
 Stroud (F.), 40 n.  
 Sumner (Lord), 136  
 Swan (K. R.), 418 *et seq.*  
 Swift (Mr. Justice), 393, 393, 395, 397-8, 401  
 Thankerton (Lord), 391  
 Thayer (J. B.), 76 n.  
 Thomson (J. A.), 279, 285 n.  
 Thring (Lord), 351  
 Tornlin (Sir T. E.), 39  
 Troup (Sir E.), 19, 23, 57, 72, 83 n., 102, 259, 275, 290 n.  
 Tucker (Lord Justice), 405  
 Tudor (O. D.), 25 n.  
 Waline ( ), 27 n.  
 Wallas (Graham), 45, 279 n., 291, 498 n.  
 Webb (Sidney), 17, 267  
 Webb (S. & B.), 17, 296 n.  
 Wells (H. G.), 287 n.  
 Wheatley (J. H.), 165  
 White (Ch. Jus. U.S.), 80  
 Whitehead (A. N.), 282 n., 284, 286 n.  
 Willis (J.), 32 n.  
 Wiltshire (F. H. C.), 442 n., 499 n.  
 Wolf (A.), 285  
 Wright (Lord), 212  
 Xenophon, 256

# INDEX

- ADJUDICATION**, distinguished from administration, 257, 324
- ADMINISTRATION, PUBLIC**,  
 according to law, 51  
 business of, 4, 51, 81  
 development of, 51  
 distinguished from adjudication, 257, 324  
 impossible without delegation, 66  
 liability to review by the courts, 81
- ADMINISTRATIVE ACTS**,  
 judicial review of, 82  
 exemplified in Ireland, 10
- ADMINISTRATIVE APPEAL TRIBUNAL**,  
 proposals for, 327
- ADMINISTRATIVE AUTHORITIES**,  
 appeals against, 499  
 appointment of officials, 43  
 authority of, 66  
 bias by, elimination of, 60  
 compared with judges, 70  
 desirability of allowing lawyers to appear before, 460  
     giving reasons for decision of, 273  
 effect of decision by, 44  
 establishment of standards of evidence by, 77  
 exercise of discretion by, 297  
 exercise powers for social improvement, 488  
 immunity not extended to, 52  
 integrity of, 59 *et seq.*  
 judicial functions of, 23  
 liability for misuse of authority by, 53  
 need not state reasons for decisions, 275  
 powers in dealing with cases, 79  
 responsibility of, 51  
 right to initiate actions, 71
- ADMINISTRATIVE COURTS**, system of, proposed by Committee on Ministers' powers, 364, 370 *et seq.*
- ADMINISTRATIVE DECISION**. *See* DECISION, ADMINISTRATIVE.
- ADMINISTRATIVE FUNCTIONS**,  
 characteristics, 13  
 distinguished from judicial, 67, 323
- ADMINISTRATIVE LAW**,  
 appeals against, 499  
 bodies concerned in carrying out in England, 499  
 characteristics, 429, 453, 454, 480  
 criticised, 327  
 dangers of, 481 *et seq.*  
 disadvantages, 454  
 growth of, 30, 427, 436, 482  
 in America, 429, 437, 474, 511  
 in England, 25 *et seq.*  
 in France, meaning of, 26  
 its aim, 516  
 Lord Hewart on, 315  
 Ministers subject to supervisory jurisdiction, 360  
 proposals before Committee on Ministers' Powers for a new system, 326  
     inexpediency of, 359  
 proposed principles which should be followed, 500 *et seq.*  
 regulation of, 488  
 revival of, 30, 426 *et seq.*  
 sources of, 427  
 weakest features of, 271
- ADMINISTRATIVE PROCEDURE**,  
 Attorney-General's Committee on, 470, 472, 495, 512
- ADMINISTRATIVE TRIBUNALS**. *See* TRIBUNALS, ADMINISTRATIVE.
- ADMINISTRATOR**,  
 actions of, may be questioned, 83  
 authority of, over subordinates, 66  
 defined, 65  
 evidence, position of, as regards, 77
- AGRICULTURAL MARKETING ACTS**,  
 aim of, 243  
 appeal on question of law, lies to High Court, 252

- AGRICULTURAL MARKETING ACTS—cont.**  
 arbitrator's decision not binding, 252  
 criticism of, 248  
 disciplinary system of, 248  
   proposals to transfer, 249  
 establishment of Board, 243  
 Falmouth Committee, the, 247  
 licences, 246  
 offences under, 245  
 powers of Board, 243 *et seq.*  
 producers' right to apply for arbitration, 251  
 schemes under, procedure for, 244
- AGRICULTURE, MINISTER OF,** powers of, under Agricultural Marketing Acts, 244
- ALBERT MEDAL,** award of, 259
- ALIENS,** classification of, by county court judges, 452
- AMERICA, UNITED STATES OF,**  
 Administrative law in, 369  
   development of, 429, 474  
   remuneration of officials, 481  
 Administrative Procedure, Attorney-General's Committee on, 470, 495, 512  
 Administrative Tribunals in, 431, 437, 440, 483, 511  
   methods of procedure, 512  
 division of powers in, 11, 15  
 evidence in, 445  
 Federal Government, the, 429  
   Trade Commission, 58, 273  
 Hearing Commissioners, appointment of, 470  
 judges and the Constitution, A. V. Dicey on, 78  
 Supreme Federal Court, defined, 80  
 workmen's compensation system in, W. F. Dodds on, 200
- ANTIQUITIES,** public purchase of, 3
- APPEAL TRIBUNALS,** lack of system in, 494
- APPEALS,** against administrative authorities, 499
- APPROVED SOCIETIES,**  
 disputes in, 123  
 powers of Minister of Health over, 100
- ARBITRARY POWER,**  
 exercise of, defined, 315  
 Lord Hewart on, 315
- ARBITRATORS,**  
 immunity of, 47, 52  
 must decide according to law, 258
- ARCHITECTS,**  
 discipline committee, appointment of, 235  
   appeal against decisions, 236, 240  
 misconduct by, 235  
 required to register, 235, 407
- ARCHITECTS REGISTRATION COUNCIL,** quasi-judicial functions of, 407
- AREA TRAFFIC COMMISSIONERS,**  
 appeals against decisions of, 96 *et seq.*, 101, 105, 389, 410, 494  
 appointment of, 96, 511  
 functions of, 99  
 granting of licences by, 93, 389, 410  
   public hearing for, 98  
 jurisdiction of, 97, 375  
 Members of Parliament not eligible, 97  
 not a court, 100  
 powers and duties of, 97 *et seq.*, 389, 447  
 relationship with Minister of Transport, 363, 488  
 road haulage system, 99
- ASSESSMENT COMMITTEE,**  
 defined, 61  
 irregular proceeding of assessment by, 406
- ASSESSORS,** appointment in Merchant Shipping Cases, 57
- ASSISTANCE BOARD.** *See* UNEMPLOYMENT ASSISTANCE.
- ASSIZE,** duties of judges on, 17
- ASYLUM OFFICERS,** superannuation claims, 116
- AUDITOR, DISTRICT.** *See* DISTRICT AUDITOR.
- AUSTRALIA,** Board of Review, a tribunal, 1, 7

- AWARDS TO INVENTORS, ROYAL COMMISSION ON. *See* INVENTORS.
- BACON MARKETING SCHEME (APPROVAL) ORDER, 1933...246
- BALLOT ACT (1872), 53
- BAR, jurisdiction over barristers, 240
- BOARD OF GUARDIANS. *See* GUARDIANS.
- BOARD OF INLAND REVENUE. *See* INLAND REVENUE.
- BOARD OF REVIEW (AUSTRALIA), a tribunal, 7
- BOARD OF TRADE. *See* TRADE.
- BOROUGHs, powers of Minister of Health regarding, 270
- BRITISH MEDICAL ASSOCIATION, characteristics of, 434  
evidence before Health Insurance Commission, 433  
opposition to Health Insurance Commission, 126, 471, 496
- BRITISH MUSEUM, antiquities purchased with public money, 3
- BUSINESS, JUDICIAL. *See* JUDICIAL BUSINESS.
- BUSINESS OF THE COURTS COMMITTEE, composition of, 415  
patent actions, recommendations, 415 *et seq.*
- CALIFORNIA, powers of government, 15
- CENTRAL ELECTRICITY BOARD. *See* ELECTRICITY BOARD.
- CENTRAL MIDWIVES BOARD. *See* MIDWIVES BOARD (CENTRAL).
- CHANCERY, COURT OF. *See* COURT OF CHANCERY.
- CHARITY COMMISSIONERS, as administrators, 24  
as judges, 24  
powers of, regarding educational foundations transferred, 25n  
regarding charities, 24  
reason for establishment, 24
- CHILDREN, in entertainment, 162  
*See also* GUARDIANSHIP OF INFANTS.
- CINEMAS, licences for Sunday opening, 297
- CIVIL DEFENCE DUTIES (COMPULSORY ENROLMENT) ORDER, 1941, provisions of, 190
- CIVIL SERVICE, changes in methods, 74
- CLASSIFICATION, advantages and disadvantages of, 286 *et seq.*  
defined, 285  
essence of, 285  
process of, 286
- CLEARANCE ORDERS, 393-397  
affirming Act an administrative Act, 394  
property owners' rights, 393 *et seq.*  
public inquiries, procedure, 472  
quasi-judicial functions of Minister, 394
- CLERK OF THE PEACE, appointment of, 43
- CLERK TO THE JUSTICES. *See* JUSTICES, CLERK.
- CLUBS, expulsion of members, 228
- COAL MINES ACT, 1930, objects of, 243  
replaced by public ownership, 243
- COMMERCE, TRIBUNALS OF, report of Select Committee on, 444n
- COMMON PLEAS, COURT OF, complaints against railway companies made to, 89

- COMPENSATION (DEFENCE) ACT, 1939,  
...211  
adjudication, methods of, 211  
compensation, principles of, 211  
decisions of Tribunal, not published, 278
- COMPULSORY PURCHASE OF LAND.  
*See* LAND ACQUISITION.
- CONSCIENTIOUS OBJECTORS, inability  
of, to state views, 462n
- CONSCIENTIOUS OBJECTORS, TRIBU-  
NALS FOR, 182, 456, 494  
characteristics of, 507  
failures of, 456  
professional advocates permitted to  
appear before, 461  
remuneration of chairman, 480
- CONSTABLE, office of, 19n  
*See also* SHERIFF.
- CONSTITUTIONAL LAW, 14, 428  
basis of, 346  
development of, 30  
individual rights under, 429
- CONTEMPT OF COURT, 50
- COPYRIGHT, refused to books deemed  
immoral, 306
- CORONER,  
appointment, 144  
performance of judicial functions  
by, 19  
work of, 19
- COUNTY COUNCILS,  
appointment of Clerk of the Peace  
by, 43  
development, 22  
immunity of members, 52  
planning, participation of, in, 153
- COUNTY POLICE, control of, 23
- COURT,  
common law courts derived from  
the King's Council, 16  
decision of, on questions of law,  
78  
defined, 9, 15  
derivation of the word, 15, 39  
jurisdiction of, over lunatics, 20
- COURT—*continued.*  
King's Court, as the dominant  
governing authority in England,  
15  
sittings *in camera*, 73
- COURT OF CHANCERY,  
equitable jurisdiction, basis of, 286  
hardened into doctrines, 436  
jurisdiction of, 35  
shifting of the living law to, 16,  
317
- COURT OF JUSTICE, proceedings must  
be public, 73
- COURT OF LAW,  
attitude of, towards domestic  
tribunals, 226  
comparison with Railway Tri-  
bunals, etc., 96  
decision of, is final, 78  
dependent on the evidence for the  
facts, 444  
distinguished from unofficial tri-  
bunals, 70  
formation of, 40  
hearings, conduct of, in, 73, 74  
jurisdiction over voluntary associa-  
tions, 226  
reasons for maintaining, 79  
rigour of procedure, 458  
verdict must be in accordance with  
the evidence, 75
- COURT OF REFEREES FOR UNEMPLOY-  
MENT INSURANCE, 362  
appeals against National Service,  
hearing of, by, 181  
Blakesburgh Committee on, 179  
claims, hearing of, by, 167  
communications to, not absolutely  
privileged, 506  
composition of, 165, 148, 475  
jurisdiction, 169  
Morris Committee's recommenda-  
tions, 180  
remuneration, 480  
Royal Commission on Unemploy-  
ment Insurance on, 180  
rules of procedure, 454  
Unemployment Benefit Claims,  
powers as to, 167  
weakness of, 459
- COURT OF REQUESTS, 16  
transference of living law to, 317

- COURTS-MARTIAL, immunity extended to, 47
- CRIMINAL COURT,  
hearings to be in open court, 73  
review of sentence of, 23
- CRIMINAL LAW,  
effect of Court of Criminal Appeal on, 493n
- CROWN,  
exercise of powers by, 28  
freedom from liability, 50, 344
- CROWN PROCEEDINGS BILL, 344  
Committee on Ministers' Powers on, 366-7  
objects of, 344
- CURIA. *See* COURT.
- CUSTOMS AND EXCISE,  
functions transferred to Ministry of National Insurance, 118  
responsible for non-contributory old age pensions, 118
- DECISIONS, ADMINISTRATIVE,  
elements of, 353  
excluded from scrutiny of the courts, 82
- DECISIONS, JUDICIAL,  
Committee on Minister's Powers on, 349  
defined, 39, 320  
distinguished from administrative order, 17  
distinguished from a legislative body, 17  
distinguished from quasi-judicial decisions, 319, 349  
elements of, 353  
finality of, 79-80  
influenced by tenure of office, 43  
psychological process of, 291  
require to be supported by evidence, 74, 275 *et seq.*
- DEFENCE OF THE REALM, ROYAL COMMISSION. *See* WAR COMPENSATION TRIBUNALS.
- DELEGATED LEGISLATION, 65, 315
- DEMOCRACY, ECONOMIC, conception of, 86
- DISCRETION,  
conditions imposed on the exercise of, 296 *et seq.*  
defined, 294 *et seq.*  
development of, 301  
element of, 6, 320  
executive, 461  
in divorce cases, 335  
judicial, 294 *et seq.*  
Lord Halsbury on, 294  
methods of translating into judicial standards, 461
- DISPUTES, INDUSTRIAL, technical knowledge, needed for adjudication of, 478
- DISTRIBUTION OF POWER. *See* POWERS.
- DISTRICT AUDITOR,  
an administrative tribunal, 185  
appeals from, 117  
appointment of, 134, 464  
audit by, appeal against, 134  
examination of, an administrative proceeding, 11  
judicial functions, 136  
powers and duties, 134 *et seq.*  
relationship with Minister of Health, 363  
required to state reasons for decisions, 134, 275  
surcharge by, appeal against, 131, 465  
jurisdiction of High Court, 135
- DISTRICT COUNCIL,  
private interests of Councillor, a disqualification, 62  
setting up of, 22
- DIVORCE,  
discretion in, 335
- DOMESTIC TRIBUNALS. *See* TRIBUNALS, DOMESTIC.
- DRAFT ADMINISTRATIVE, 26  
distinguishing features of, 27  
not recognised by common law, 29  
opposed to principles of English constitution, 360
- ECONOMIC SCIENCE, 270  
control of, 482 *et seq.*

- EDUCATION ACTS, 156 *et seq.*, 432  
duties and powers of central and local authorities under, 156  
functions of local education authority, 158  
independent schools, 162  
schools, instrument of management, 158  
trust deeds, 158
- EDUCATION, BOARD OF,  
judicial functions of, 155  
jurisdiction of, 155, 378  
no power to administer oaths, 379  
powers of, 155 *et seq.*  
replaced by Ministry of Education, 155
- EDUCATION, MINISTER OF,  
children's entertainment, powers as to, 163  
creation of, 156  
duties and powers, 156  
judicial functions, 155 *et seq.*  
powers, 156  
local education authority, exercise of functions of, 159  
right to intervene, 159  
school attendance, jurisdiction as to, 159  
schools independent, supervision of, 162  
settlement of disputes by, 156  
teachers' allowances, 161  
teachers' superannuation, powers as to, 10  
trust deeds, modification of, by, 158
- ELECTIONS,  
duties of Presiding Officer at, 53  
the Returning Officer, 19
- ELECTRICITY BILL (1946). *See* APPENDIX.
- ELECTRICITY BOARD, CENTRAL,  
appeals to Electricity Commissioners, 149  
creation of, 148  
obligations to supply, 148  
powers of, 148
- ELECTRICITY COMMISSIONERS,  
appointment of, 147  
functions of, transferred to Board of Trade, 145
- ELECTRICITY COMMISSIONERS—*contd.*  
judicial functions of, 147  
powers of, 117  
powers and duties, 147, 148
- ELECTRICITY SUPPLY ACTS,  
creation of Central Electricity Board, under, 148  
powers of Commissioners, under, 147
- ELECTRICITY UNDERTAKINGS,  
powers of Commissioners over, 147-8  
settlement of disputes, 148  
standardisation of frequencies by, 148  
supply of power generated by, 148
- EMPLOYER AND EMPLOYEES,  
legal obligations of employer under National Service Acts, 193  
under Reinstatement in Civil Employment Act, 193  
rights of employees under Workmen's Compensation Acts, 195  
to contribute to National Insurance (Industrial Injuries) Scheme, 197
- EQUALITY BEFORE THE LAW, 264, 267  
not confined to judicial proceedings, 267  
tradition of, founded in the law courts, 268
- ESSENTIAL WORKS ORDERS,  
local appeal boards, constitution of, 476  
powers, 192, 508  
power of National Service Officer, 192  
worker's right of appeal, 191
- EVIDENCE,  
amount of, necessary to support a decision, 75  
judge's decision must be in accordance with, 75  
method of establishing, 459  
taking of, explained, 75
- EXECUTIVE,  
hegemony of, explained, 31  
legislative and judicial functions acquired by, 314  
opposition of, to the judiciary, 316



- EXECUTIVE—*continued*.  
 powers of, 79  
 rights of, 33  
 officials to initiate action, 71
- FACTORIES, overtime in, 3
- FALMOUTH COMMITTEE (on the Imposition of Penalties), 247 *et seq.*  
 recommendations, 250
- FAMILY ALLOWANCES,  
 appeals against Minister's decisions, 201  
 claims for, 201  
 panel of referees to administer, appointment of, 201  
 scheme for, 201  
 tribunals for, 201 *et seq.*
- FEDERAL TRADE COMMISSION OF AMERICA,  
 an administrative tribunal, 273  
 defined and discussed, 58, 273
- FIRE PREVENTION (BUSINESS PREMISES) ORDER, 1941...189
- FOREIGN OFFICE, issue of passports by, 77, 83
- FRANCE, *droit administratif* in, 26, 369
- FRIENDLY SOCIETIES,  
 appointment of registrar, 510  
 powers of chief registrar, 207  
 registration of, hearing of appeals against, 206  
 trade unions, functions of registrar, 207
- FRIENDLY SOCIETIES, CHIEF REGISTRAR OF,  
 administrative official, 209  
 appointment of, 205  
 decisions of, appeal against, 207  
 different from a court of law, 210  
 duties of, 205 *et seq.*  
 hearing of appeals by, 206  
 judicial powers of, as to trade unions, 208  
 Industrial Assurance Commissioner, 209  
 registration, powers as to, 207
- FUEL AND POWER, MINISTER OF,  
 a permanent department, 145
- FUEL & POWER, MIN. OF—*contd.*  
 as an appellate body, 146  
 disputes as to production, 148  
 Electricity Commissioners, appointment of, by, 147  
 interim development, powers as to, 152  
 judicial functions, 144  
 powers of, as to gas undertakings, 145  
 electricity undertakings, 145, 147
- FUNCTIONS, ADMINISTRATIVE. *See* ADMINISTRATIVE FUNCTIONS.
- FUNCTIONS, JUDICIAL. *See* JUDICIAL FUNCTIONS.
- FURNISHED HOUSES (RENT CONTROL) ACT, 1946,  
 features of, 204  
 objects of, 203  
 powers under, 203, 204  
 tribunal to administer, 203
- GAS UNDERTAKINGS ACTS,  
 administration of, 145  
 appeals against, 146  
 appointment of gas examiner, 145
- GENERAL MEDICAL COUNCIL. *See* MEDICAL COUNCIL.
- GUILDS, STATUTORY. *See* MARKETING BOARDS.
- GOVERNMENT,  
 basis of, 2  
 conception of, 52, 267  
 functions of, 2, 4, 14, 18  
 how differentiated from foreign countries, 30  
 in England, 14, 29  
 independence of colonial, 46  
 rule of law, a feature of, 29
- GOVERNMENT DEPARTMENTS,  
 decisions need not be conclusive, 361  
 exercise of powers conferred on, by Act of Parliament, 379  
 judicial functions, 385  
 powers, 427  
 need not follow methods adopted by the courts, 384

GUARDIANSHIP OF INFANTS,  
proceedings relating to, to be in  
private, 74

GUARDIANS OF THE POOR, super-  
annuation grants, 5

HEALTH, LOCAL BOARDS OF, estab-  
lishment of, 22

HEALTH, MEDICAL OFFICERS OF. *See*  
MEDICAL OFFICERS OF HEALTH.

HEALTH, MINISTER OF, 107-117  
advisory powers of, 307  
as an appellate body, 107, 108, 324  
Committee on Minister's Powers,  
evidence of, 322  
compulsory purchase of land, pro-  
cedure, 56  
decisions, as to liability to health  
insurance, 118  
element of discretion in, 322  
*et seq.*  
means of arriving at, 120  
district auditor, appointment of,  
134, 464  
appeals from, 117, 184  
relationship with, 363  
Furnished Houses Rent Control  
Acts administered by, 203  
improvement scheme, powers of  
Minister, 300  
inspector's report, 400  
interim development, powers of  
Minister, 393  
judicial decisions, 378, 450  
judicial functions, 107 *et seq.*  
under Public Health Act re-  
pealed, 111  
judicial powers, 322 *et seq.*  
jurisdiction over housing, 112, 114,  
338, 300  
under Public Health Acts, 110,  
380  
Local Government Board, duty  
regarded as judicial, 106  
officers' superannuation, juris-  
diction of Minister, 115  
medical practitioners, hearing of  
appeals regarding complaints,  
127, 457, 494  
National Health Insurance, settle-  
ment of claims by, 122  
National Health Service, com-  
plaints against medical prac-  
titioners, 457  
Scheme, 434

HEALTH, MINISTER OF—*continued.*  
panel doctors, constitution of tri-  
bunals for complaints against,  
448  
planning powers of, transferred,  
150  
power of, to determine questions  
of fact, 120  
powers over housing, 112, 290  
medical practitioners, 124  
treatment of insured persons,  
123  
powers under National Health In-  
surance Acts, 117 *et seq.*  
Local Government Act, 269  
Public Health Acts repealed, 110  
Service Acts, 131  
Small Dwellings Acquisition  
Act, 115  
Superannuation Schemes, 115 *et*  
*seq.*  
procedure not necessarily judicial,  
382  
of appeals against decisions of,  
114, 381  
responsibility to Parliament, 382  
right of appeal against decisions  
of, 108 *et seq.*  
sanitation, appeal against de-  
cisions of local authorities, 108  
water supply, interim develop-  
ment, 152

HEALTH, MINISTRY OF, Memos., 118

HEALTH, PUBLIC. *See* PUBLIC  
HEALTH.

HEARING, IN CAMERA,  
judge's belief in desirability, not  
sufficient to justify, 73

HIGH COURT,  
jurisdiction of, 69  
to review Compulsory Purchase  
Orders, 400  
procedure not suited to task of  
controlling administrative autho-  
rities 365  
specialised compartments of, 444  
surcharge by district auditor,  
jurisdiction of, over, 135

HIGHWAY AUTHORITIES,  
decision by, right of appeal  
against, 64

HIGHWAY AUTHORITIES—*continued*.  
 establishment of, 22  
 position under Ribbon Development Act, 63

HOME SECRETARY,  
 Albert Medal awards by, 259  
 as an appellate body, 28, 72, 143, 494  
 assessors for merchant shipping cases, appointment of, by, 57  
 Railway and Canal Commissioners, appointment of, by, 57  
 coronors, powers over, 144  
 duty, of reviewing criminal cases, as final court of appeal, 72  
 explosives, control of, by, 141  
 judicial functions of, 141  
 murder cases, duty of, in, 289  
 petrol licences, issue of, by, 142  
 police, responsibility of, for, 143  
 grants, issue of, by, 143  
 powers, 24  
 probation services, 144  
 reformatory schools, functions of, in connection with, 143  
 reprieve by, powers of, 259

HOPS MARKETING SCHEME (1932) and (1934), 246, 253

HOUSING ACTS,  
 appeals against decisions of local authorities, 392  
 clearance orders, powers of Minister, 390 *et seq.*  
 compulsory purchase of land orders, 395, 397  
 interim development, 393  
 powers of local authorities as to, 392  
 powers of Minister of Health as to, 112  
 schemes under, 391, 395

HOUSING AND TOWN PLANNING ACTS,  
 condition of working-class houses, 112  
 Ministry of Health as an appellate body under, 112  
 powers of local authorities under, 111  
 procedure of appeals, 113  
*See also TOWN AND COUNTRY PLANNING.*

IMMUNITY AGAINST LEGAL ACTION,  
 extended to an arbitrator, 47  
 courts-martial, 47  
 justices of the peace, 47

for judicial acts, 49n  
 of a county councillor, 52  
 of the judge, 46 *et seq.*, 52

IMPARTIALITY,  
 conditions necessary to ensure, 41  
 difficult to maintain, 466  
 judicial, defined, 64

IMPONDERABLES, exclusion of, 286

IMPOSITION OF PENALTIES, Report of Departmental Committee, 1939 ...248 *et seq.*

IN CAMERA. *See* HEARING IN CAMERA.

INCOME TAX,  
 appointment of Special Commissioners, 511  
 effect of legislation on authorities, 343  
 impartiality of Special Commissioners, 466

INCOME TAX COMMISSIONERS,  
 an administrative tribunal, 361  
 Committee on Minister's Powers on, 361  
 decisions final, only on questions of fact, 87  
 may not decide own cases, 54  
 surveyor of taxes, cannot witness appeals against his own determinations, 61

INDUSTRIAL ASSURANCE COMMISSIONERS, 205 *et seq.*  
 examination of affairs by, 7

INDUSTRIAL ASSURANCE COMPANIES,  
 examination into affairs of, a judicial proceeding, 73  
 examination of affairs of, by Commissioners, 7  
 judicial functions of registrar, as Commissioner, 209

INDUSTRIAL COURT, position of, 80

- INDUSTRIAL INJURIES, tribunals for, 194 *et seq.*  
*See also* NATIONAL INSURANCE (INDUSTRIAL INJURIES).
- INDUSTRIAL REVOLUTION, effects of, 22, 88
- INFANTS. *See* GUARDIANSHIP OF INFANTS.
- INLAND REVENUE, BOARD OF, decisions, 260  
 powers of, to impose a fine for non-stamped documents, 260
- INNS OF COURT, jurisdiction exercised over barristers, 240  
 position of judges, 240  
 unincorporated voluntary associations, 240
- INSURANCE COMMITTEES, alleged excessive sickness of insured persons, procedure by, 128  
 appeals against decisions of, 127
- INSURANCE OFFICER, powers over unemployment benefit claims, 166
- INTERIM DEVELOPMENT, application to develop land, 150  
 by statutory undertakers, 151  
 operational land, application to develop, 152  
 powers of Minister as to, 150, 393
- INVENTORS, ROYAL COMMISSION ON AWARDS TO, 212 *et seq.*, 275  
 appointment of, 212  
 new Commission, 214  
 authority of, 214  
 basis of award by, 213  
 object of, 213  
 powers as to compensation, 214  
 presided over by High Court judge, 511  
 terms of reference, 214
- ISSUES, JUSTICIABLE OR NON-JUSTICIABLE, examples of, 322
- JUDGES, administrative function of, 19, 303, 331
- JUDGES—*continued.*  
 appointment of, 43, 479  
 business of, 17  
 decisions of, 55, 75, 258, 275  
   must contain an element of certainty, 268  
   psychological process of, 291  
 discretion of, 295, 334  
 disqualifications, 55  
 distinguished from administrators, 65, 70  
 equitable jurisdiction of, 266  
 freedom from parliamentary criticism, 80  
 functions, 72, 80  
   J. B. Cardozo on, 295, 310  
 immunity of, from legal liability, 47, 49, 52, 487  
 impartiality of, described, 64, 264, 309  
 independence of, 40, 42, 44, 54  
   in New South Wales, 46  
 influence of ethical considerations on, 306  
 integrity of, 54 *et seq.*  
 legislating by, principles of, 352  
*lis inter partes*, 86 *et seq.*  
 more confined to evidence, than administrators, 76  
 must act personally, 65  
 must act within jurisdiction, 49  
 must decide according to law, 258  
 must possess a policy, 300  
 must possess certain conceptions, 307  
 necessity of evidence for decision, 74, 77  
 not concerned with government, 370  
 patent actions, 421  
 power over ward of court, 20, 21, 287  
 powers to mitigate the penalty in cases of murder, 289  
 qualifications, Blackburn, J., on, 54  
 salary of, 41  
 security of tenure, 41  
 tenure of office, 41, 44, 66  
 trial, duty of, as to, 72
- JUDGMENT, defined, 263.
- JUDICATURE. *See* JUDICIARY.
- JUDICIAL ACTS, defined, 16

JUDICIAL ACTS—*continued*.

- distinguished from administrative, 12, 17 <sup>6</sup>
- examples of, 7
- immunity for, 49n

## JUDICIAL AUTHORITIES,

- appointment of, 43
- disqualified by financial interest, 63

## JUDICIAL BUSINESS, distinguished from administrative, 17

JUDICIAL DECISIONS. *See* DECISIONS, JUDICIAL.

## JUDICIAL FUNCTION,

- acquisition by the executive denounced, 33
- characteristics of, 13, 65, 68, 75, 78
- completeness of, 18
- conferred on large departments, 86, 451
- discharge of, special tribunals for, 477
- distinguished from administrative, 4, 12, 16, 21, 67, 323
- essence of, 70
- essentials for proper performance, 81, 472
- general conception of, 39
- identified, 5, 39
- of government departments, classified, 5, 86
- performance of, by coroner, 19
- exemplified, 81
- protection of all persons called upon to perform, 49
- should be subject to review, 86
- test of, 67
- the right to be heard, 71 *et seq.*

JUDICIAL MIND, 255 *et seq.*

- an important element in the judicial process, 34
- compared, 266
- development of, 312
- its accomplishments, 35
- psychological background, 255
- sense of relevance essential to, 265

## JUDICIAL POWER,

- Chief Justice White on, 80
- defined, 7 *et seq.*, 66, 75
- distinguished from quasi-judicial power, 319

## JUDICIAL PROCEEDINGS, 78

- classifying process, illustrated by, 283
- conditions of, 65
- defined, 38, 307
- popular notion of, 3

## JUDICIAL PROCESS,

- characteristics, 74
- defined, 256
- effect when set in motion, 70
- elements of, 470
- evolution of, 258
- function of, 307
- need for consistency, 258 *et seq.*
- outward features of, 85
- popular notions of, 38
- test of, J. M. Landis on, 446

JUDICIAL REVIEW, 409 *et seq.*

- of administrative activities, Committee on Ministers' Powers on, 357
- the right to, 82

## JUDICIAL SPIRIT,

- consistency of, 259
- equality of, 263
- meaning of, 256

## JUDICIAL SYSTEM, growth of, meaning of, 16

## JUDICIARY,

- as part of the public service of the Crown, 42
- attitude of, to administrative tribunals, 376, 377, *et seq.*
- immunity of, from criticism, 50
- independence of, 41, 42
- opposed to the executive, 316
- work of, 5, 33

## JURISDICTION,

- exercised of, 49
- by Lord Chancellor, 35
- over lunatics, 20

## JUROR, duty of, to declare knowledge, 76

## JURY, position of, described, 76, 278

## JUSTICE,

- according to law, meaning of, 33
- administration of, 255, 281, 477
- characteristics of, 49
- must be certain, 268

- JUSTICE—*continued*.  
     administration of—*continued*.  
         requirements of, 255, 304, 310,  
         477  
     demand for new type of, 31  
     establishment of, 40  
     in the courts, 38 *et seq.*
- JUSTICE, ADMINISTRATIVE,  
     advantages of, 488  
     development, 375  
     limitations of, 481 *et seq.*;  
     National Service and growth of,  
     375  
     proposed principles of procedure,  
     503
- JUSTICE, COURT OF. *See* COURT OF  
     JUSTICE.
- JUSTICE, NATURAL, rules of, 409
- JUSTICE OF THE PEACE,  
     administrative duties, transferred,  
     22  
     classification of duties, 10, 17  
     discretion, exercised by, in local  
     government, 297  
     duties of, 17, 295  
         subject to review, 87  
     functions of, 52  
     immunity extended to, 47  
     jurisdiction in licensing cases, 28,  
     60  
     liquor licences, issue of, by, 68  
     local government administered  
     by, 49  
     must decide according to law, 258  
     non-judicial action exemplified,  
     67  
     protection of, 49  
     rise of, 16, 52  
     warrant, issue of, by, to con-  
     stable, 9  
     work, now mainly judicial, 22
- JUSTICES, CLERK TO, cannot act as  
     solicitor before his own bench,  
     58
- JUSTICES' COURT OF SESSION, 17
- KING'S BENCH,  
     control of administration of, 17  
     judicial duties of justices, subject  
     to review, 87
- KING'S COUNCIL,  
     an administrative body, 16  
     transference of judicial powers to,  
     16, 317
- KING'S COURT,  
     dominant government authority,  
     16  
     not a judicial body, 40n
- LABOUR AND NATIONAL SERVICE,  
     MINISTER OF,  
         conscientious objectors, appoint-  
         ment of tribunal by, 182  
         duties, 6  
         powers under National Service  
         Act, 182  
         relationship with National Service  
         Committees, 363  
     Unemployment Insurance, 118,  
     161  
         appointment of officers, 172
- LAND ACQUISITION, 395, 397  
     advisory powers of Minister, 397  
     granting of certificate for, by Lord  
     Lieutenant, an administrative  
     act, 74n  
     jurisdiction of High Court to  
     review, 400  
     position of arbitrator, 77
- LAW, ENGLISH,  
     defined, 280  
     influence of public policy, 305  
     policy of, Sir John Anderson on,  
     333  
     strength of, 487
- LAW, REIGN OF. *See* REIGN OF  
     LAW.
- LAW SOCIETY, admission to, how  
     granted, 239
- LAW-MAKING OF, business of, 4, 453
- LEGISLATION, business of, 4
- LICENCES,  
     appeal for grant of, 105  
     cinemas, position of licensing  
     authorities, 297  
     issue of, by L. C. C., 57  
     motor transport, 97  
     public service vehicles, 97 *et seq.*  
     right of appeal against refusal,  
     101

- LICENCES (DRIVERS AND CONDUCTORS).  
 appeals from refusal of, 102
- LICENCES (ROAD SERVICE),  
 appeals against not granting, 101  
 applications for, to be public, 98  
 issue of, by Traffic Commissioners, 97  
 statutory conditions of, 98  
 system of, for road haulage vehicles, 99, 104
- LICENSING JUSTICES,  
 duty of, 60  
 refusal of certificates when not an act of discretion, 299  
 required to state reasons for decisions, 275
- LIEUTENANT-GOVERNOR, exercise of judicial functions by, 386
- LIQUOR LICENCES,  
 in America, 68  
 issue of, 23  
 right of public to object to, 68  
 Lord Herschell on, 6, 67  
 opposition to grant of, 6  
 position of overseers when granting, 299
- LIS INTER PARTES, analysis of, 67  
*et seq.*  
 conception of, 70  
 Lord Herschell on, 67
- LITIGANT, rights of, 72
- LOCAL APPEAL BOARDS, 191 *et seq.*  
 composition of, 191  
 functions of, under Essential Works Order, 191 *et seq.*  
 no legal powers of determination, 191  
 workers' right of appeal to, 191
- LOCAL AUTHORITIES,  
 accounts of, 134  
 appeals from decisions of, 109, 150  
 children's entertainment, licences to take part in, 162  
 Clearance Orders, 393-7  
 decisions, not always judicial, 377  
 development of land, applications to, 150  
 discretion exercised by, 296  
 disqualifications of members, 63
- LOCAL AUTHORITIES—*continued.*  
 explosives, procedure as to, 142  
 housing estates, provided by, 114  
 schemes under, 392  
 National Health Service and, 133  
 petrol licences, application made to, for, 142  
 powers under Education Acts, 156  
 concerning house property, 112  
 over landlord, 56, 112, 377  
 required to act judicially, when granting licences, 267  
 slum clearance, procedure by, 113  
 transfer of powers between, 323
- LOCAL BOARDS OF HEALTH. *See* HEALTH.
- LOCAL GOVERNMENT,  
 administration of, 295  
 by justices of the peace, 49  
 development in England, 22  
 increase of control over, effects of, 29  
 powers of Minister of Health under statute, 269
- LOCAL GOVERNMENT, ROYAL COMMISSION ON, 1923...17, 18, 23, 33, 256, 270
- LOCAL GOVERNMENT BOARD. *See* HEALTH, MINISTER OF.
- LOCAL GOVERNMENT OFFICERS,  
 compensation for loss of office, 108  
 superannuation, jurisdiction of Minister of Health, 115
- LOCAL GOVERNMENT BOARD, IRELAND,  
 order by, constituting a township, a judicial act, 6
- LOCAL GOVERNMENT AND PUBLIC HEALTH CONSOLIDATION COMMITTEE, 1933...110
- LONDON BUILDING TRIBUNAL, 202  
 constitution of, 202  
 decisions of, final, 203  
 jurisdiction of, 202  
 members, 448  
 power to hear various appeals, 202
- LONDON COUNTY COUNCIL,  
 issue of licences by, 57  
 report of gas examiner, on deficiency of power, a judicial act, 6

- LONDON PASSENGER TRANSPORT BOARD, fares, jurisdiction of Railway Rates Tribunal over, 95
- LONDON, PORT OF. *See* PORT OF LONDON.
- LONDON STOCK EXCHANGE, jurisdiction over members, 236
- LORD HIGH CHANCELLOR, appoints county court judges, 20 as a judge, 20 as a member of the Cabinet, 20 as head of formal judicial system, 20 as the chief legal adviser to the Government, 20 cannot receive assistance in his judicial capacity, 65 disposal of Church livings by, 20 jurisdiction exercised by, 35 system of equity administered by, 258
- LORDS, HOUSE OF, bound by its own decisions, 261, 352
- LUNACY ACT, 1890...20n
- LUNATICS, jurisdiction over, 20 powers of High Court judge over, 20
- MACHINERY OF GOVERNMENT COMMITTEE, Report of, 20n, 65
- MAGISTRATES, discretion of, 334
- MARKETING BOARDS, 242 *et seq.* different from voluntary associations, 246 disciplinary powers, 241 legal powers, 246, 427 statutory gilds, 242 *See also* AGRICULTURAL MARKETING ACTS.
- MEDICAL BENEFIT REGULATIONS, 125
- MEDICAL COUNCIL (THE GENERAL), as a judicial body, 311 exercise of judicial functions by, 311 hearings of evidence by, 230n
- MEDICAL COUNCIL (GENERAL)—*contd.* position as declared by Court of Appeal, 212 powers of removing doctors from registers, 230
- MEDICAL OFFICERS OF HEALTH, security of tenure, 41n
- MEDICAL PRACTICES COMMITTEE, appointment, 131 election of panel doctors by, 131 powers, 131
- MEDICAL PRACTITIONERS, appointment of, under National Health Service Act, 131 misconduct by, 231, 457 remuneration deduction from, 127 tribunal to hear appeals against, 132
- MEDICAL PRACTITIONERS' UNION, opposed to National Health Insurance Scheme, 433, 150
- MEDICAL SERVICES, appointment of doctors, etc., 131
- MERCHANT SHIPPERS ACTS, 57 appointment of assessors, 57 powers, of administering transferred, 104 Board of Trade under, 102 settlement of disputes under, 104, 448
- MIDWIVES (CENTRAL) BOARD, appeals against decisions of, 210 establishment of, 240
- MILITARY SERVICE, liability for, 193
- MILITARY SERVICE (HARDSHIP) COMMITTEES, 182 constitution of, 181, 188 hearing of appeals, 181 *et seq.*, 493, 510 judicial functions, 181, 188 jurisdiction of, under Defence Regulations, 189 jurisdiction of, under Civil Defence Duties (Exemption Tribunals) Order, 190
- MILK MARKETING BOARD, Falmouth Committee Report on, 217 Scheme, 253



- MILK MARKETING SCHEME (APPROVAL ORDER), 1933...246
- MINISTERIAL TRIBUNALS. *See* TRIBUNALS, MINISTERIAL.
- MINISTERS,  
judicial powers of, 346 *et seq.*  
jurisdiction of, 377 *et seq.*
- MINISTERS' POWERS, COMMITTEE ON,  
314-376, 387, 445, 452, 455, 507  
administrative courts, proposed  
system of, 364  
administrative law, French  
system compared, 366  
administrative tribunals, publica-  
tion of reports by, 455  
Allen's (Dr.) views, 367  
appeal tribunal, proposal for, 365  
author's proposals, 361 *et seq.*  
consideration of judicial powers  
by, 318  
constitution of, 317  
Crown Proceedings Bill, 366, 367  
delegated legislation, 120, 123,  
124, 272, 314 *et seq.*, 455  
effects of Report in the courts, 401  
evidence of Sir John Anderson,  
331  
evidence of the author, 326 *et seq.*  
evidence of Sir M. Gwyer, 318  
*et seq.*, 452  
evidence of Minister of Health,  
322  
evidence of National Federation of  
Property Owners, 336 *et seq.*  
evidence of Sir Claud Schuster,  
330  
evidence of Sir Ellis Hume-Wil-  
liams, 329  
evidence of Treasury Solicitors,  
features of, 318  
findings of, 347  
Jenning's, Dr., criticisms, 364  
judicial decision defined by, 349  
judicial or quasi-judicial decisions,  
319 *et seq.*, 349  
judicial review of administrative  
activities, 357  
public inquiries, views of, as to,  
366  
recommendations, 354 *et seq.*  
Special Commissioners of Income  
Tax, impartiality of, 361, 466  
teachers' superannuation, 161  
terms of reference, 317, 375  
tribunals, ministerial, 355 *et seq.*
- MINISTRY OF FUEL AND POWER. *See*  
FUEL AND POWER.
- MINISTRY OF HEALTH. *See* HEALTH.
- MINISTRY OF LABOUR. *See* LABOUR,  
MINISTER OF, AND NATIONAL  
SERVICE.
- MINISTRY OF TRANSPORT. *See*  
TRANSPORT.
- MOTOR TRANSPORT, licences for, 97
- MUNICIPAL BOROUGH, reform of, 22
- MURDER CASES,  
duty of Home Secretary in, 289  
judge in, 289  
royal prerogative of mercy, exer-  
cise of, 289 *et seq.*
- NATIONAL HEALTH INSURANCE ACTS,  
approved societies recognised  
under, 271  
lack of confidence in, due to pro-  
cedural defects, 458  
Royal Commission on, 120, 123 *et*  
*seq.*, 126, 129, 433, 442n, 459,  
471, 503  
functions, 463  
judicial powers, 462  
position of Commissioners in  
relation to Treasury, 463  
settlement of disputes under, 122
- NATIONAL HEALTH INSURANCE  
(MEDICAL BENEFIT), Reports of  
Inquiries and Appeals, 124 *et*  
*seq.*
- NATIONAL HEALTH SERVICE ACT,  
130, 448
- NATIONAL HEALTH SERVICE SCHEME,  
B.M.A.'s opposition to, 434  
complaints against medical prac-  
titioners, 457  
requirements of, 432
- NATIONAL INSURANCE,  
administration, 117  
Beveridge Report, 117, 156  
British Medical Association,  
opposed to, 126  
machinery for complaints,  
criticised, 126

- NATIONAL INSURANCE—*continued*.  
 powers of Minister of Health, 117  
*et seq.*  
 scheme, 176 *et seq.*, 432, 463
- NATIONAL INSURANCE ACT, 1946,  
 administrative tribunals for, 178  
 appeals from local tribunals, 493  
 determination of claims and ques-  
 tions, 177  
 right to benefit, 177
- NATIONAL INSURANCE COMMISSIONER,  
 appeals to, 177, 493  
 appointment, 177, 511
- NATIONAL INSURANCE, MINISTER OF,  
*administration of Unemployment*  
*Insurance Scheme*, 164  
 appeals against decisions of, 178  
 hearing of pensions appeals by,  
 174  
 judicial functions, 178, 462  
 powers as to widows', etc., pen-  
 sions, 175  
 responsibility of, under National  
 Insurance (Industrial Injuries)  
 Act, 198  
 under Family Allowances  
 Scheme, 201
- NATIONAL INSURANCE (INDUSTRIAL  
 INJURIES) ACT, 1946,  
 appeals against decisions, 198  
 appointment of Commissioners,  
 199  
 claims for benefit, 198  
 effect of, on the courts, 199  
 local appeal tribunals under, 198,  
 494  
 machinery of adjudication, 194 *et*  
*seq.*  
 medical aspects, 198  
 principles of compensation, 197  
 questions of law, may be referred  
 to High Court, 198  
 workmen's compensation replaced  
 by, 197
- NATIONAL MEDICAL SERVICE TRI-  
 BUNALS, 190
- NATIONAL SERVICE (ARMED FORCES)  
 ACTS, 180 *et seq.*, 474, 490  
 appeals against, 181  
 conscientious objectors, tribunals  
 for, 456  
 hardship, distinguished, 182
- NATIONAL SERVICE (ARMED FORCES)  
 ACTS—*continued*.  
*implication of*, 433  
 legal obligation of employer to re-  
 instate, 193  
 machinery of adjudication, 181  
 Military Hardships Committee,  
 181-190  
 postponement certificates, power of  
 Minister of Labour as to, 182  
 regulations as to, 183, 490  
 tribunals, 180 *et seq.*
- NATIONAL SERVICE OFFICERS,  
 duty of, 192  
 powers, under Essential Work  
 Order, 192
- NATIONAL SERVICE (ARMED FORCES)  
 (POSTPONEMENT CERTIFICATES)  
 REGULATIONS, 1939...182, 490
- NATIONAL SERVICE AND MILITARY  
 HARDSHIP COMMITTEES, relation-  
 ship with Minister of Labour,  
 363
- NATURAL JUSTICE,  
 Committee on Ministers' Powers  
 on, 356  
 principles of, 227, 385, 496  
 rules of, 409
- NEW SOUTH WALES, independence  
 of judges in, 46
- OATHS, judicial, 54
- OFFICIAL RECEIVERS, meaning of, 25
- OFFICIALS,  
 appointment of administrative, 43  
 right to initiate action, 71
- OLD AGE PENSIONS ACT, 1936...174n  
 claims under, 174  
 non-contributory pensions respon-  
 sibility of Customs and Excise,  
 118
- 'OPEN COURT.' *See* HEARING IN  
 CAMERA; PUBLIC HEARING.
- ORAL HEARING, importance of, as a  
 method of establishing facts, 469

## ORDERS,

- Bacon Marketing Scheme (Approval) Order, 1933...246
- Civil Defence Duties (Compulsory Enrolment) Order, 1941...190
- Essential Works Orders, 191, 192
- Fire Prevention (Business Premises) Order, 1941...189
- Hops Marketing Schemes Orders, 1932, 1934...246
- Milk Marketing Scheme (Approval) Order, 1933...246
- Pigs Marketing Scheme (Approval) Order, 1933...246
- Potato Marketing Scheme (Approval) Order, 1933...246

ORGANISATIONS, vocational, 234 *et seq.*

## PARDON,

- conditional, 23
- free, as a means of rectifying injustice, 23

PARISH COUNCILS, 22

## PASSPORT,

- evidence required for issue of, 77
- issue by Foreign Office, 77, 83

## PATENTS,

- appeals, 410, 414, 422
- appeal tribunal, establishment of, 412
- Business of the Courts Committee on, 415
- designs, appeals relating to, 414
- establishment of Patent Office, 410
- 'extension of time', actions, 418
- grant of, 410
- patent rights, enforcement of, 413
- procedure, reform of, 418
- Sargant Committee on, 411, 413 *et seq.*, 420
- Swan Committee on, 417 *et seq.*
- system of, criticised, 411, 421 *et seq.*
- trial of actions, system of, 420

## PATENT AGENTS,

- must register as such, 235
- Rules, 1909...231

## PATENT APPEAL TRIBUNAL,

- appeals to, 418
- Rules, 1932...412

PATENT APPEAL TRIBUNAL—*contd.*

- Swan Committee recommendations, 424

## PATENTS, COMPTROLLER GENERAL OF,

- an administrative officer, 415
- an executive officer, 413, 414
- appeals, 139, 141, 422
- as custodian of public interest, 418
- Business of the Courts Committee Report, 415
- control of, 139
- functions of registrar, 139
- judicial powers of, 141
- jurisdiction, 412, 414 *et seq.*
- powers of, Swan Committee Report on, 419
- Sargant Committee on, 411 *et seq.*

## PATENTS AND DESIGNS ACT AND PRACTICE OF THE PATENT OFFICE, DEPARTMENTAL COMMITTEE, 411, 421

PEACE, JUSTICE OF THE. *See* JUSTICE OF THE PEACE.

PENAL SERVITUDE, substitution for capital punishment, 23

PENALTIES, IMPOSITION OF, REPORT ON. *See* IMPOSITION OF PENALTIES.

## PENSIONS,

- committees for, 174
- appeal against decisions of, 174
- schemes, tribunals for deciding claims, 173 *et seq.*
- See also* WAR PENSIONS.

## PENSIONS APPEAL TRIBUNALS,

- constitution, 175
- rules of evidence, 403

## PIGS MARKETING SCHEME (APPROVAL) ORDER, 1933...246

## POLICE,

- appeals by, to Home Secretary, 143, 494
- county, control of, 23
- power of dismissal of constable, 402
- watch committee, position of, 402

## POLICY,

- administrative, 333

- POLICY—continued.*  
distinguished from law, 333  
in quasi-judicial decisions, 334
- POLITICAL INTERFERENCE WITH JUDICIAL DECISIONS*, 461 *et seq.*
- POOR, GUARDIANS OF.* *See* *GUARDIANS OF THE POOR.*
- PORT OF LONDON AUTHORITY*,  
constituted, 386  
licences, granting of, by, 298  
powers of, 386  
refusal to grant licences, appeal against, 387
- POTATO MARKETING BOARD*, Falmouth Committee Report on, 247
- POTATO MARKETING SCHEME (APPROVAL) ORDER*, 1933...246
- POWER TO ENFORCE*, not an essential of the judicial function, 81
- POWERS*,  
distribution of, 1, 2  
separation of, 13 *et seq.*  
doctrine of, 14  
sovereign power, conception of, 14n
- PRESIDING OFFICER*, duties, at elections, 53
- PRESS*, serious criticism of judicial process permissible in, 50
- PRIVATE STREET WORKS*, appeals, 499
- PRIVILEGE, ABSOLUTE*, doctrine of, in relation to judicial functions, 48
- PRIVY COUNCIL*, 17
- PROBATION COMMITTEES*, disagreements between, and local authorities, 144
- PROMISSORY OATHS ACT*, 1868...54
- PROVISIONAL ORDERS*, system of, 457
- PROPERTY OWNERS*,  
clearance orders, rights of property owners, 393 *et seq.*
- PROPERTY OWNERS—continued.*  
interference with rights of, 337  
Swift, J., on rights of, 338
- PROPERTY OWNERS, NATIONAL FEDERATION OF*,  
demands by, as to appellate jurisdiction of Ministers, 338  
for judicial functions of government departments to be transferred, 338  
evidence of, before Committee on Ministers' Powers, 336
- PUBLIC ADMINISTRATION*, 65, 432, 466
- PUBLIC ASSISTANCE*, officers' superannuation, 116
- PUBLIC HEALTH ACTS*,  
appeals under, 109  
conduct of public inquiries, 448  
powers given to sanitary authorities, 108  
powers of Minister of Health, repealed, 110  
*See also* *HEALTH, MINISTER OF.*
- PUBLIC HEALTH CONSOLIDATION BILL*, 110
- PUBLIC HEARING*, 73
- PUBLIC INQUIRIES*,  
reports on, treated as confidential, 356  
Committee on Ministers' Powers on, 356  
right of parties to see report, 356
- PUBLIC OFFICERS*,  
bribery by, 59  
must be free from bias, 59 *et seq.*  
responsibility, 65  
title of, no indication of function performed by, 331
- PUBLIC POLICY*,  
defined, 306  
influence on legal doctrine, 305
- PUBLIC SERVICES*, liability of an administrator of, 42
- PUBLIC SERVICE VEHICLES*, 97 *et seq.*  
licences, 99  
right of appeal against grant-  
ing of, 101

PUBLIC WELFARE, 2

PUBLICITY,  
a characteristic of the judicial  
process, 74  
lack of, a disadvantage of Ad-  
ministrative Tribunals, 454

PUNISHMENT, CAPITAL, penal servi-  
tude substituted for, 23

QUARTER SESSIONS,  
appeals to, under Public Health  
Acts, 109  
appointment of gas examiner by,  
145  
judicial duties of justices subject  
to review by, 87

QUASI-JUDICIAL DECISIONS, policy in,  
334

QUASI-JUDICIAL POWER,  
Committee on Ministers' Powers  
on, 319 *et seq.*  
decisions based on discretion, 320  
defined, 350, 354  
distinguished from judicial, 319,  
349, 362, 376  
functions, exercise of, 394

RAILWAYS,  
amalgamation, 92  
authority of tribunal over, 95  
complaints against companies,  
made to Court of Common  
Pleas, 89

RAILWAY AND CANAL COMMISSION,  
a Court of Record, 92  
appointment of Commissioners,  
57, 91  
effects of new Transport Bill on,  
96  
features, 87 *et seq.*  
in Northern Ireland, 91n  
in Scotland, 91n  
not an administrative court, 29  
powers, 92  
qualifications of members, 92

RAILWAY AND CANAL TRAFFIC REGU-  
LATION ACT, 1854...88, 90  
jurisdiction transferred to Com-  
missioners, 90, 451  
provision for complaints against  
railway companies, 89, 449

RAILWAY COMPANIES AMALGAMATION  
(1872),  
appointment and duties of Com-  
missioners, 89  
form of procedure, 89  
report, 88, 449 *et seq.*

RAILWAY COURTS, 86 *et seq.*

RAILWAY FREIGHT REBATE SCHEME,  
94

RAILWAY RATES TRIBUNAL, 93 *et seq.*  
a Court of Record, 95  
an administrative tribunal, 95  
appointment of members, 94n, 511  
decisions, not subject to review,  
95  
effect of new Transport Bill, on,  
96  
jurisdiction, 94

RATING AUTHORITY, disqualification  
of officers, 61

REFEREES, COURT OF. *See* COURT OF  
REFEREES.

REIGN OF LAW,  
defined, 2  
doctrine of, 34

REINSTATEMENT IN CIVIL EMPLOY-  
MENT ACT,  
admission of counsel before com-  
mittee, 461  
appeal boards, constitution of, 476  
appeals to, committees, 194, 493  
constitution of committees, 193  
machinery of adjudication, 193  
obligations of employers, 193  
powers of tribunal, 194

REMEDIES, LAW OF, modern de-  
velopment of, 345

REQUESTS, COURT OF. *See* COURT  
OF REQUESTS.

RESTRICTION OF RIBBON DEVELOP-  
MENT, ACT,  
appellate powers of Minister of  
Transport, 277  
decisions under, by Minister, to  
be supported by reasons, 277,  
457

- RESTRICTION OF RIBBON DEVELOPMENT ACT—*continued*.  
inquiries under, to be held in public, 277  
position of highway authority, 63
- RETURNING OFFICER,  
an administrative official, 19  
not a judicial officer, 19
- RIGHT TO DELEGATE, 65
- RIGHT TO BE HEARD, THE, 71 *et seq.*
- ROAD HAULAGE, licensing system, 99, 101
- ROAD AND RAIL 'TRAFFIC' APPEAL TRIBUNAL, 105 *et seq.*,  
a Ministerial tribunal, 368  
appellate powers, 494  
appointment of members, 106, 375, 511  
decisions by, final, 107  
functions of, 96, 105  
jurisdiction of, 106  
no power to subpoena witnesses, 107  
rules of procedure, 106
- ROAD TRAFFIC ACT, 1930  
appeals under, 388  
compensation for loss of office under, 103  
effects of, 96  
powers of Area Traffic Commissioners under, 488
- ROYAL PREROGATIVE OF MERCY,  
Lord Gladstone on the exercise of, 289  
powers, 259  
Sir Wm. Harcourt on, 290
- SANITARY AUTHORITIES, powers under the Public Health Acts, 108
- SANITARY COMMISSION (ROYAL), 1871  
...44  
legal remedy of mandamus, 435
- SCHOOLS, INDEPENDENT,  
defined, 162  
must be registered, 162  
right of appeal of proprietor, 163  
tribunal, constitution of, 163  
appointment of, 511  
hearing of appeals by, 163
- SCHOOLS, REFORMATORY, functions of Home Secretary, re, 143
- SCIENCE,  
basis of, 262  
discussed, 279  
founded upon reason, 280  
Karl Pearson on scientific method, 285
- SHERIFF, gradual acquirement of judicial duties, 19
- SOLICITORS,  
admission to Law Society, how granted, 239  
as Clerk to the Justices, 58  
Disciplinary Appeal Rules, 239  
effects of complaints against, 239  
rights of appeal, 239
- STAR CHAMBER, 48  
shifting the living law to, 16, 317  
notorious tyranny in, 18
- STATISTICS, defined by A. L. Bowley, 279
- STATUTORY UNDERTAKERS,  
development of operational land, procedure re, 152  
interim development by, 151
- SUPREMACY OR RULE OF LAW, defined, 342
- SURVEYOR OF TAXES, cannot witness appeal against his determination, 61
- TEACHERS, allowances, powers of Minister of Education as to, 161
- TEACHERS (SUPERANNUATION),  
legislation as to, 160 *et seq.*  
machinery of, 161  
powers of Minister of Education as to, 160
- TENURE OF OFFICE, effect of mental processes on, 43
- TOWN AND COUNTRY PLANNING BILL, 1946. *See* APPENDIX.

- TOWN AND COUNTRY PLANNING,  
 MINISTER OF,  
 an administrative tribunal, 151,  
 154  
 appeals to, 150  
 buildings, powers as to, 153  
 control of interim development,  
 151  
 judicial functions, 150, 375  
 planning powers of Minister of  
 Health transferred to, 150  
 powers of, 150
- TOWN AND COUNTRY PLANNING  
 (INTERIM DEVELOPMENT) ACT,  
 1943...151
- TOWN PLANNING SCHEMES,  
 development order for, 152  
 requirements of, 492
- TRADE, BOARD OF,  
 appeals against decisions by, 138  
 electricity undertakings, trans-  
 ferred to, 145  
 judicial functions, 102, 138 *et seq.*  
 powers as to joint stock companies,  
 138  
 Patents, Designs, etc., 139  
 powers as to registration of busi-  
 ness names, 139  
 powers under Bankruptcy Act, 138  
 Merchant Shipping Acts, 104  
 Weights and Measures Act,  
 138
- TRADE MARKS, 139 *et seq.*
- TRADE UNIONS,  
 breach of agreement by, 241  
 complaints by members, 207  
 declaration of membership, 241  
 expulsion of members, 241  
 functions of Registrar, as to, 207  
 misapplication of funds of, 208  
 position of courts, 241, 247  
 powers of, 496  
 right to penalise, 225  
 stop list, 224  
*See also* VOLUNTARY ASSOCIATIONS.
- TRAFFIC COMMISSIONERS. *See* AREA  
 TRAFFIC COMMISSIONERS.
- TRANSPORT BILL, 1946. *See* APPEN-  
 DIX.
- TRANSPORT, MINISTER OF,  
 appeals against Traffic Commis-  
 sioners, 101  
 appellate powers of, under Restric-  
 tion of Ribbon Development  
 Act, 277, 457  
 Road Traffic Act, 388  
 Area Traffic Commissioners,  
 appointment of, by, 96  
 relationship with, 363  
 drivers' licences, 98  
 electricity undertaking transferred,  
 145  
 improper discretion by, 298  
 interim development, powers as  
 to, 151  
 judicial functions, 96, 101 *et seq.*  
 jurisdiction, 375, 378  
 licensing powers, 101  
 Merchant Shipping Acts, 102, 104  
 public service vehicles, regula-  
 tions, 99  
 Road and Rail Appeal Tribunal,  
 appointment of, 106  
 Road Traffic Act, powers of,  
 under, 101, 488  
 settlement of disputes, 104  
 Trunk Roads Act, transfer of  
 powers under, 64
- TRANSPORT TRIBUNAL. *See* Appen-  
 dix.
- TREASURY, BOARD OF, position in  
 relation to Insurance Commis-  
 sioners, 463
- TRIAL, conduct of, 72
- TRIBUNALS,  
 appearance of, in English Consti-  
 tution, 30  
 distinguished from courts of law,  
 8, 70  
 failure of, to reveal principles  
 underlying their decisions, 272
- TRIBUNALS, ADMINISTRATIVE,  
 advantages of, 439 *et seq.*, 458  
 alleged incapability to act impar-  
 tially, examined, 461  
 appeals from decisions of, 493  
 appointment, 469, 510  
 attitude of judiciary to, 376, 508  
 classification, 510  
 costs of, compared, 440

TRIBUNALS, ADMINISTRATIVE—*contd.*

- criticised, 311
- decisions, 276 *et seq.*
- defined, 12
  - in United States, 216
- disadvantages, 262, 454
- distinguished from bodies of judicial commissioners, 87
- distinguished from domestic tribunals, 497
- evidence before, 403
- failure of, to provide quick methods of adjudication, 441
- failure to enunciate clearly, 271
- flexibility of, 452
- formation, 438
- growth of, 69, 473
- growth of, in United States, 431
- judicial functions, 130, 321, 322, 368, 387, 486
- Ministers' responsibility, 491
- need for consistency, 495
- need not give reasons for decisions, 483, 454
- not liable to political interference (more than courts of law), 462
- personnel of, 477, 497
- powers to enforce a policy, 453
- proceedings, 487
- procedure of, 265, 381, 403, 441
- proposals for, before Committee on Ministers' Powers, 328
- proposed principles concerning powers and jurisdiction, 499
- publicity, lack of, a drawback, 454
- reasons for establishment of, 302, 446
- regulation, of, 486 *et seq.*
- remuneration of officials, 480
- right to an oral hearing before, 460
- rulings, Mr. Justice Holmes on, 293
- should be required to give reasons for decisions, 277, 457
- specific judicial power conferred on by the State, 484
- structure of, 467 *et seq.*
- test of, 446
- work of, 485, 487

TRIBUNALS OF COMMERCE,  
question of establishing, 444n  
Select Committee Report on, 444n

TRIBUNALS, DEPARTMENTAL,  
criticised, 452

R.

TRIBUNALS, DOMESTIC,

- ability to regulate own procedure, 242
- attitude of courts of law towards, 226
- authority of, 254
- conditions of proceedings in, 230
- control over, 495 *et seq.*
- criticism of, 311
- decisions of, Sir F. Pollock on, 242
  - should be subject to review, 233, 237, 254, 497
- defects and disadvantages, 478
- distinguished from administrative tribunals, 497
- failure of, to enunciate clearly, 497
- immunity of, from the courts, 230, 496
- judicial proceedings, by, 230 *et seq.*
- members must be free from bias, 231
- must act within their jurisdiction, 230
- need not give reasons for decisions, 237
- personnel of, 497
- powers of, 496
- proposals for, 499 *et seq.*
- vocational organisations, 234 *et seq.*
- voluntary associations, 219 *et seq.*

TRIBUNALS, MINISTERIAL,

- appeals against, 358
- appointments to, 358
- decisions of, 358
- jurisdiction of, 359
- recommendations of Committee on Ministers' Powers on, 355, 358

TRUNK ROADS ACT, transfer of roads  
to Minister of Transport, 64

UMPIRE'S COURT, weakness of, 459

UNEMPLOYMENT ASSISTANCE,

- functions of Board, 172
- meaning of, 172
- tribunals for, 172 *et seq.*

UNEMPLOYMENT BENEFITS, claims to,  
166

UNEMPLOYMENT INSURANCE,  
administration of, 164



- UNEMPLOYMENT INSURANCE—*contd*  
 Blanesburgh Committee on, 179  
 claims for benefit, 165, 186, 110  
     rules of procedure, 461  
 dependants benefit, 163  
 Morris Committee on, 179  
 no oral hearing for, 508  
 right of appeal against, 165  
 Royal Commission on, 1930 180  
 scheme, 164, 482  
 structure of courts, 166  
 trade dispute disqualifications, 169  
 tribunals, 161  
 umpire defined, 170, 180  
     powers of, concerning claims, 165
- UNITED STATES *See* AMERICA,  
 UNITED STATES OF
- VALUATION OFFICER, cannot be  
 present with Assessment Com-  
 mittee, 61
- VIVISECTION, 3
- VOCATIONAL ORGANISATIONS, 231 *et*  
*seq*
- VOLUNTARY ASSOCIATIONS, 219 *et*  
*seq*  
 activities, 222  
 characteristics 222  
 conception of, 221  
 expulsion of members, 228  
 judicial functions performed by,  
     222  
 legal status, 219  
 objects, 219  
 organs of justice, 225  
 powers, 222  
 stop list, 224
- WAGES COUNCIL, a subordinate legis-  
 lative authority, 485
- WAR COMPENSATION TRIBUNALS, 211  
*et seq.*  
 does not publish reasons for  
 awards, 275
- WAR COMPENSATION TRIBUNALS—  
*continued*  
 General Claims Tribunal, 211  
 methods of adjudication, 211  
 powers of, 211  
 shipping tribunal, establishment  
 and appointment, 211
- WARDS OF COURT,  
 authority of court over marriage  
 of, 21  
 decision of court as regards  
 religion of, 21  
 education and upbringing of, 21  
 jurisdiction and powers of a  
 judge, 20, 21, 287
- WAR PENSIONS COMMITTEES, 174  
 appeals against decisions of, 175
- WARRANTS, issue of, 9
- WATCH COMMITTEE, dismissal of  
 constable by chief constable, 61
- WATER SUPPLY, interim develop-  
 ment 152
- WARREN'S COMPANY, applications  
 for licences, to, 11
- WESTERN CIVILISATION, growth of,  
 2
- WIDOWS', ORPHANS' AND OLD AGE  
 CONTRIBUTORY PENSIONS, 175  
 claims for, to be made to Minister  
 of National Insurance, 175  
 remuneration of referees, 481
- WORKING CLASSES, housing of, 112
- WORKMEN'S COMPENSATION ACTS,  
 defects of, 197  
 legal rights to compensation  
 under, 195  
 replaced by National Insurance  
 (Industrial Injuries) Act, 197  
 system of, 195 *et seq*  
     in America, 200

